FILE COPY

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1969

No. 1399

Office-Supreme Court, U.S.
FILED
APR 8 1970
JOHN F. DAVIS, CLERK

RICHARD M. BROUGH,

Petitioner,

vs.

THE BOARD OF EDUCATION OF MILLARD COUNTY SCHOOL DISTRICT, JACK NELSON, DELMA JEAN GAILEY, and GERALD B. HUFF, Members of the Board, and TALMAGE TAYLOR, Superintendent,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

I. DANIEL STEWART
WILLIAM J. LOCKHART
Cooperating Attorneys
American Civil Liberties Union
College of Law
University of Utah
Salt Lake City, Utah

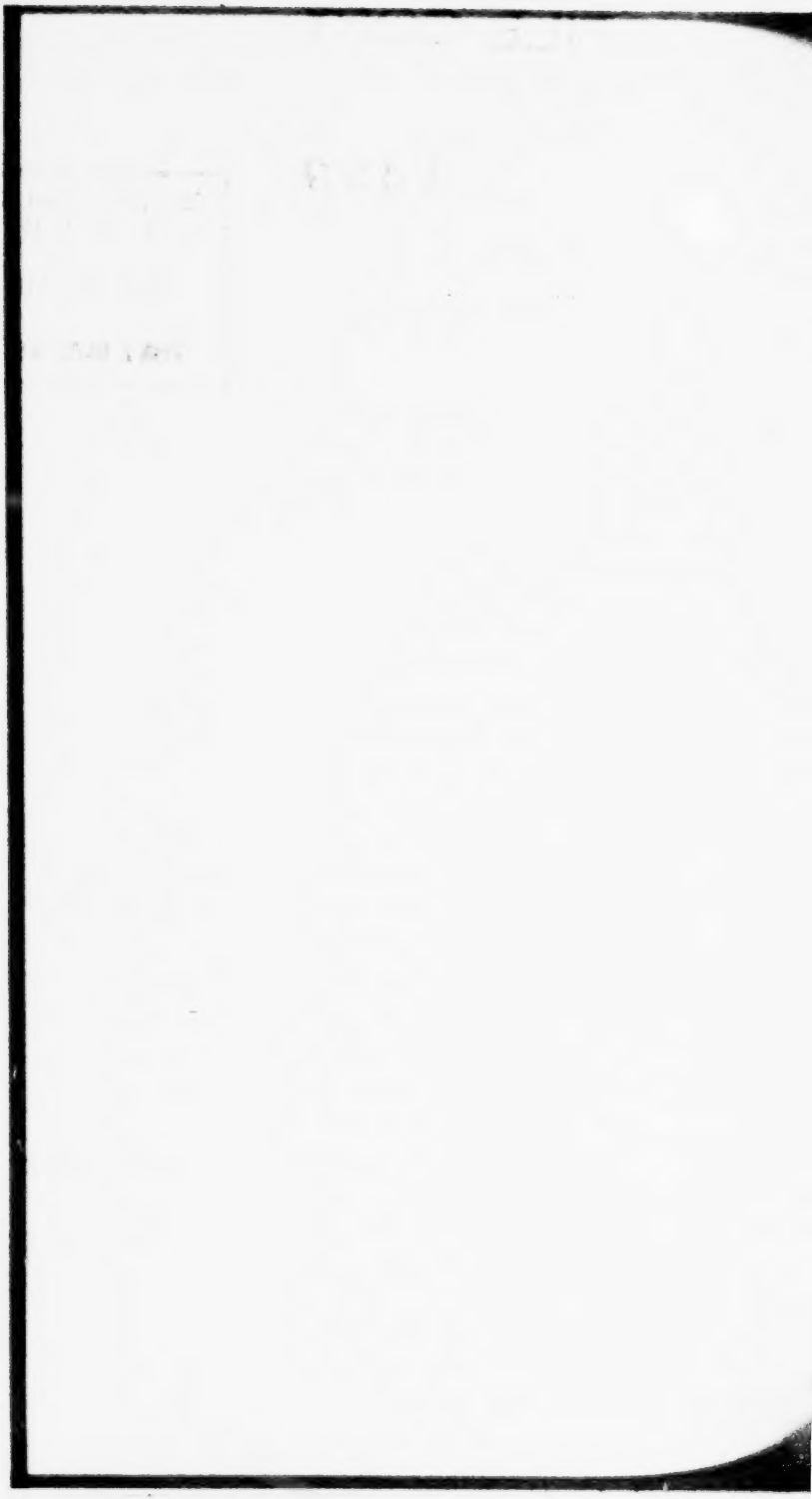
WALTER R. ELLETT
5085 South State
Murray, Utah

Attorneys for Petitioner

THORPE WADDINGHAM
Delta, Utah

CANNON, GREENE, NEBEKER & HORSLEY
RICHARD H. NEBEKER
400 Kennecott Building
Salt Lake City, Utah

Attorneys for Appellants



BLEED THROUGH POOR COPY

TABLE OF CONTENTS

Page

OPINIONS BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED 2

CONSTITUTIONAL PROVISIONS INVOLVED . . . 4

STATEMENT OF THE CASE 5

REASONS FOR GRANTING WRIT 19

POINT I: THE BOARD OF EDUCATION MAY NOT CONSTITUTIONALLY DISMISS A TEACHER FOR REFUSAL TO COMPLY WITH SANCTIONS IMPOSED MERELY BECAUSE OF HIS "EXPRESSED DISAGREEMENTS" WITH FEDERAL AID PROGRAMS 19

POINT II: MEETINGS HELD BY THE BOARD OF EDUCATION FAILED TO PROVIDE ANY OPPORTUNITY TO REFUTE SPECIFIC CHARGES OR ANY OTHER INGREDIENT OF A FAIR HEARING THAT WOULD SATISFY DUE PROCESS OF LAW AS REQUIRED BY THE FOURTEENTH AMENDMENT 31

CONCLUSION 43

APPENDIX A (__ Utah 2d __, 463 P.2d 567 (1970)) A-1

APPENDIX B (23 Utah 2d 174, 470 P.2d 336 (1969) B-1

APPENDIX C C-1

CASES CITED

Page

Birnbaum v. Trussell, 371 F.2d 672 (2d Cir. 1966) 33

Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966) 28

Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961) 33

Esteban v. Central Missouri State College, 277 F. Supp. 649 (W.D. Mo. 1967). 33

Green v. McElroy, 360 U.S. 474 (1959). . . 33

Hannah v. Larche, 363 U.S. 420 (1960) 33

Keyishian v. Board of Regents, 385 U.S. 589 (1967) 20, 22

Lucia v. Duggan, 303 F. Supp. 112 (D. Mass. 1969). 33

Pickering v. Board of Education, 391 U.S. 563 (1968). . . . 20, 21, 22, 26, 27

Pred v. Board of Public Instruction, 415 F.2d 851 (5th Cir. 1969) 22

Slochower v. Board of Higher Education, 350 U.S. 551 (1956). 21

Swaaley v. United States, 376 F.2d 857 (Ct. Cl. 1967) 22

Tinker v. Des Moines School District,
393 U.S. 503 (1969) 21, 22

Willner v. Committee on Character &
Fitness, 373 U.S. 96 (1963) 33

CONSTITUTIONAL PROVISIONS AND STATUTES

Page

U.S. CONSTITUTION, Amendment I 4

U.S. CONSTITUTION, Amendment XIV, § 1 . 4

28 U.S.C. § 1257(3) (1964) 2

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1969

No. _____

RICHARD M. BROUGH,

Petitioner,

vs.

THE BOARD OF EDUCATION OF MILLARD COUNTY SCHOOL DISTRICT, JACK NELSON, DELMA JEAN GALLI and GERALD B. HUFF, Members of the Board, and TALMAGE TAYLOR, Superintendent,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

Petitioner, Richard M. Brough, requests that a writ of certiorari issue to review the order of the Supreme Court of Utah entered January 8, 1970.

BLEED THROUGH POOR COPY

OPINIONS BELOW

The opinions of the Supreme Court of Utah are reported at __ Utah 2d __, 463 P.2d 567 (1970), and 23 Utah 2d 174, 460 P.2d 336 (1969). Copies of these opinions are attached as Appendices A and B respectively. The unpublished memorandum decisions and judgment of the District Court for the Fifth Judicial District, Millard County, Utah, are attached as Appendix C.

JURISDICTION

The decree sought to be reviewed was entered on January 8, 1970, expressly rejecting petitioner's First Amendment claims and denying a petition for rehearing. The statutory provision believed to confer jurisdiction on this Court is 28 U.S.C. § 1257(3) (1964).

QUESTIONS PRESENTED

1. Where a teacher was given a disciplinary transfer on the stated ground of

his "expressed disagreements" with federal aid programs and because his "articles in the state and local papers . . . created a most unfavorable attitude" toward those programs, did the Utah Supreme Court correctly hold, in rejecting petitioner's petition for rehearing, that the First and Fourteenth Amendment "right of freedom of speech in a school teacher cannot prevent a school board from taking such action with respect to school personnel as in its judgment will most efficiently and properly fulfill its responsibility . . . ."?

2. Whether it is consistent with the requirements of the Due Process clause of the Fourteenth Amendment for a school board to subject a teacher to disciplinary transfer and dismissal for his "expressed disageements" with board policy without providing any opportunity to refute specific charges, to know the factual basis for board action,

to examine and cross-examine witnesses or to have available any of the usual ingredients of a fair hearing?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment (Section I):

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

At the beginning of the 1967-68 school year petitioner was a full-time career teacher at Millard High School, Fillmore, Utah, with a contract option to renew his teaching contract for the succeeding year. He was also an elected representative to the Utah State Legislature.

Petitioner was vocal in expressing his opposition to school board policies and programs involving reliance upon federal funding. The present case arose from sanctions imposed upon petitioner by the school board because of his dissent.

On October 12, 1967, after an article by petitioner attacking federal aid programs had appeared in the local paper, the school board placed petitioner on probation and ordered him transferred immediately to Delta Junior High School, Delta, Utah--approximately 40 miles from petitioner's

home in Fillmore. That decision was reached by the school board without notice or hearing to petitioner.

The reason for transfer was stated in a letter to petitioner dated October 13, 1967, informing him of the school board's action:

> Your expressed disagreements with the policies and educational programs as adopted by the Board of Education and your refusal to cooperate with the Board of Education and the teaching profession has caused teachers to fail to renew contracts with the Millard School District and has created friction and unrest with other teachers in the district.
>
> [Exhibit "B" to petitioner's complaint, Record, page 7. Admitted by answer to be a true and correct copy of the letter notifying petitioner of the School Board's action, Record, page 24. Emphasis supplied.]

There was no indication in the Board's letter or at any subsequent proceedings how or in what particulars petitioner had been guilty of any "refusal to cooperate" except by his "expressed disagreements" with the Board's policies.

That petitioner's "expressed disagreements" were the basis for the School Board's original action was even more clearly demonstrated by the prepared statement of Mr. Golden P. Wright, principal of Millard High School, which he read at the School Board's meeting of October 27, 1967:

> Mr. Brough has been guilty since the beginning of school of what I would term unprofessional disloyalty. He has undermined with both citizens and students the policies and procedures of the superintendent and the school board. The articles in the state and local papers, critical of team teaching, audio-visual aids, the media center and other federally funded district projects, has (sic) created a most unfavorable attitude toward these projects. A concerted effort was made on the part of the administration and most of the teachers of the Millard High School to create a constructive attitude toward these programs with the students. It was disconcerting and frustrating to have these programs undermined in the articles mentioned.
>
> In my opinion the effectiveness of these programs was impaired seriously by Mr. Brough's written statements . . . .

[Exhibit P.4, Case No. 5721 in the district court, incorporated as an exhibit in this case, and relied upon in the Affidavit of Talmage Taylor, Superintendent of the Board of Education of Millard County School District, Record, page 56. Emphasis supplied.]

Thus, the original decision to subject petitioner to a disciplinary transfer and probation was based only upon petitioner's "expressed disagreements" with school policies and programs.

After the meeting of October 27, 1967, the school board attempted to discharge petitioner. But that decision was not based on any additional ground--only upon petitioner's refusal to yield to the intrusion upon his right of free expression. Even respondents' brief before the Supreme Court of Utah declares that to be the basis for the School Board's actions. See Respondents' Brief to the Supreme Court of Utah, pages 31-32.

The affidavit of Superintendent Talmage Taylor (Record, page 58) also makes clear

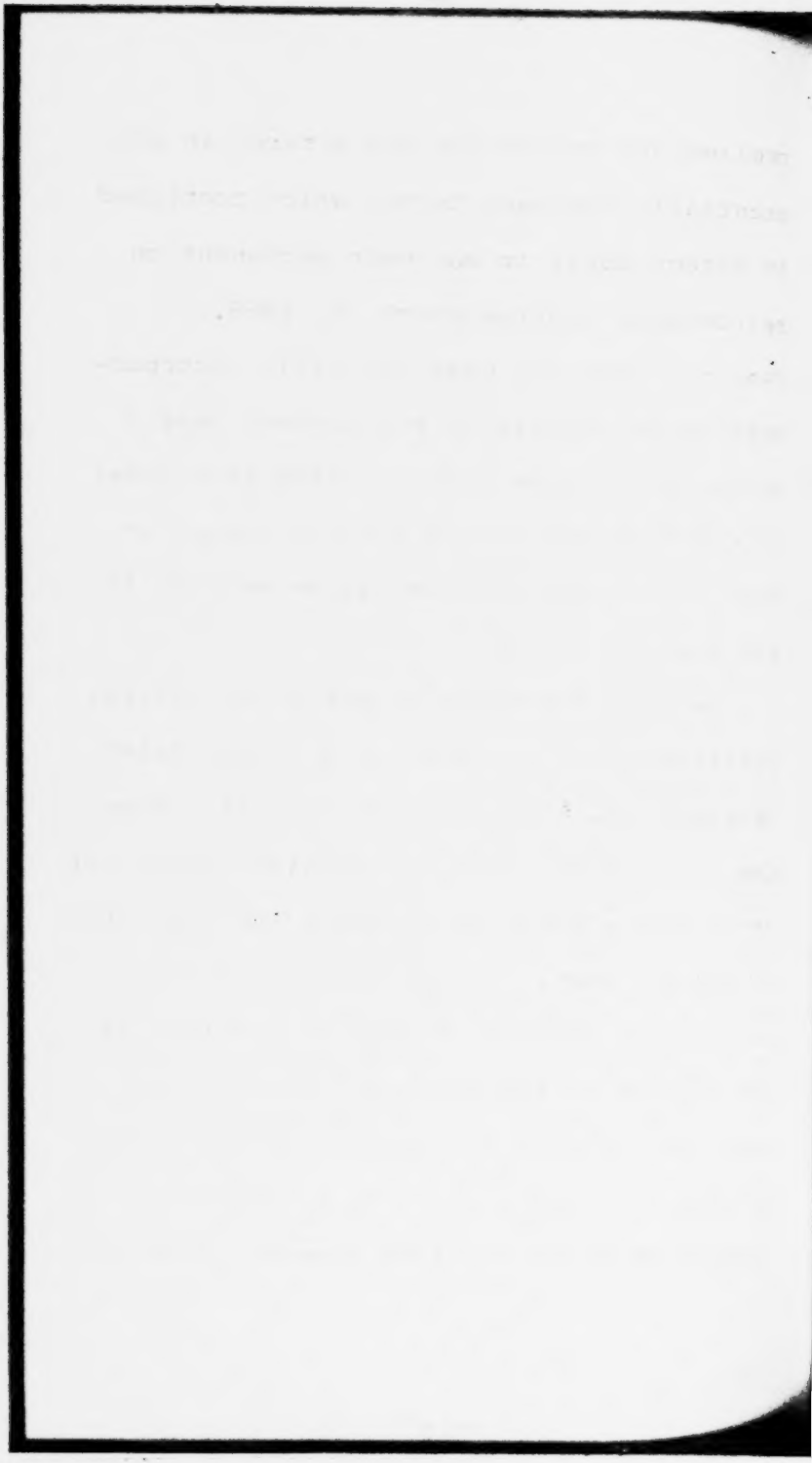
that the primary reason for the attempted discharge was his "insubordination" in refusing to accept sanctions (transfer and probation) imposed because of his "expressed disagreements." Thus, respondents' motion for summary judgment sought dismissal--

> on the ground that it appears [Petitioner] was guilty of insubordination . . . in refusing to transfer from Millard High School to Delta Junior High School . . . and the [Respondent] Board of Education was lawfully entitled, in its judgment and discretion, to not renew [Petitioner's] contract . . . for such reason.
>
> (Record, page 71.)

To prevent effectuation of the October 27, 1967, decision to discharge petitioner, a temporary restraining order was obtained, preventing respondents "from putting into effect or making any decision to terminate or change the circumstances of [petitioner's] employment as a teacher . . . ." (Record, Page 18, Case No. 5721, incorporated as an exhibit in the present case.) Later a

preliminary injunction was entered in substantially the same terms, which continued in effect until it was made permanent on respondents' motion March 25, 1968. (Record, page 62, Case No. 5721, incorporated as an exhibit in the present case.) Respondents never appealed from that order of the district court; but the record in that action was received as an exhibit in the present action.

Despite the entry of the above orders, petitioner was notified in a letter dated February 16, 1968 (Record, Page 66), that the respondent Board of Education would not offer him a teaching contract for the 1968-69 school year. No explanation of this action was offered, except to say that it was "[d]ue to the difficulties which we have encountered and because of the unrest in the school . . . ." In a responding letter of March 10, 1968 (Record, page 59),



BLEED THROUGH, POOR COPY

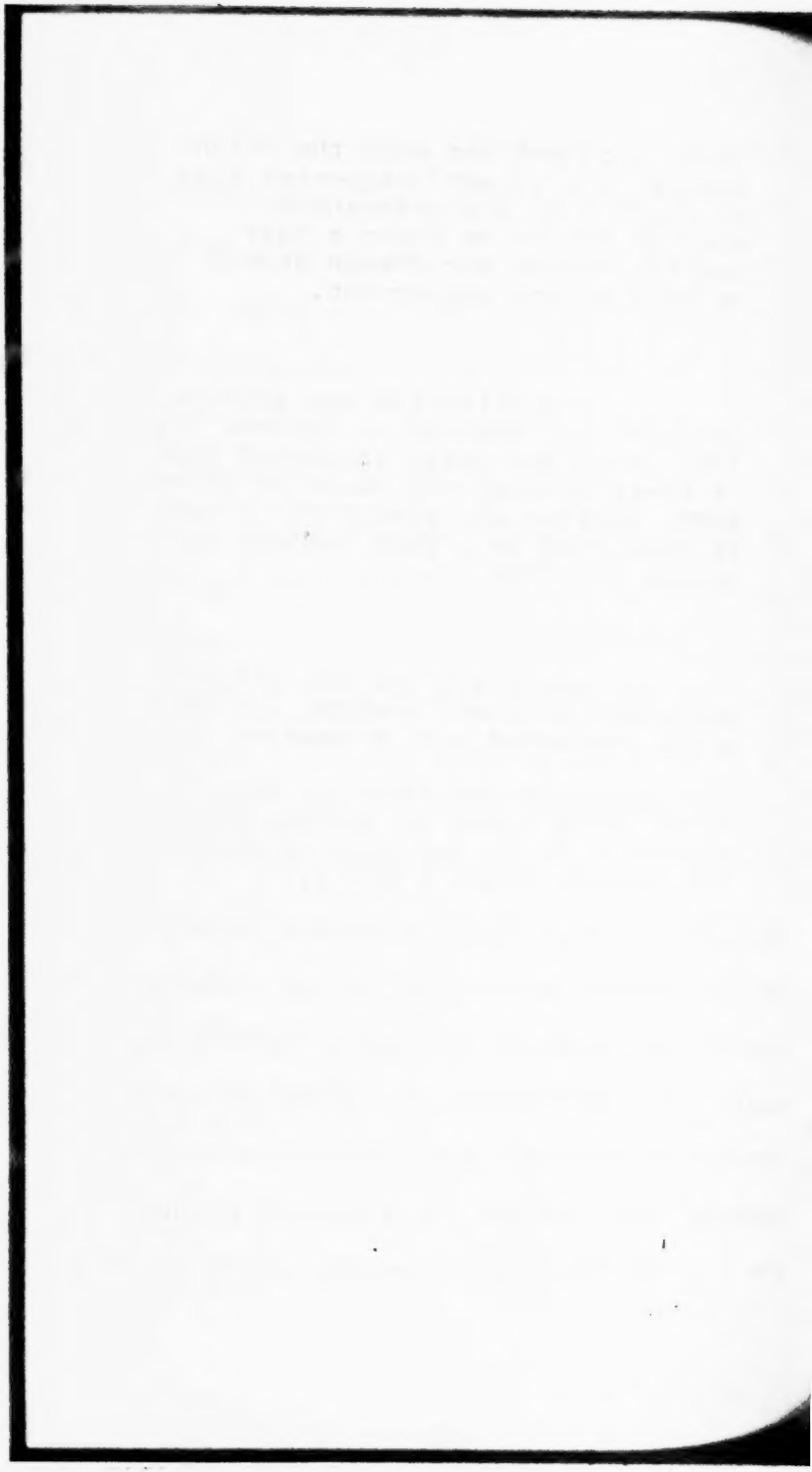
petitioner contended that the Board's action did not "satisfy the requirement of your contract and of due process of law"; and he further claimed to exercise his contract option to renew his teaching contract for the next school year. When the School Board took no official action in relation to petitioner's letter, on May 6, 1968, he commenced the present action for reinstatement. That relief was granted by the District Court in its summary judgment of May 29, 1969. (Appendix C.)

Petitioner's complaint in the latter action at various points alleged his demands upon the School Board for a fair hearing on the claims made against him, also indicating the absence of any such hearing:

> [D]efendants, without prior notice to plaintiff, attempted to reassign him to a different teaching position . . . . Said attempted reassignment was made . . . without allowing the plaintiff any hearing or opportunity to object . . . . [P]laintiff and his attorney travelled to Delta,

> Utah [sic] and met with the defendant[s] . . . [and] requested that if there were any grievances against him he be given a fair hearing before any change should be made in his employment.
>
> . . . .
>
> . . . Plaintiff and his attorney attended [a] meeting on October 17, 1967 [sic] and again requested that if there existed any cause of grievance against the plaintiff to have it presented in a fair hearing by proper evidence . . . .
>
> . . . .
>
> . . . Plaintiff and his attorney attended [another] meeting and once again requested a fair hearing . . . .
>
> [Petitioner's complaint in Case No. 5752, First Cause of Action, paragraphs 5, 7, 9; see also paragraph 10; Record, pages 2 and 3.]

The affidavit of Superintendent Talmage Taylor, filed in support of respondents' motion for summary judgment, nowhere suggests that petitioner was given an opportunity to confront and question witnesses against him despite the repeated requests for a fair hearing. (Record, pages 53-56.)



BLEED THROUGH, POOR COPY

The district court found that the Board did not conduct any hearing at which petitioner had an opportunity to confront his accusers or to contest disputed facts. Indeed, he was given no notice of the facts in dispute. (Appendix C-7, C-16&-17.)

At the Board meeting of October 27, 1967, the Board first "met in Executive Session," later brought petitioner in and permitted Principal Wright to "read his statement to Mr. Brough," and then in another Executive Session voted to dismiss petitioner. The Board continued to emphasize petitioner's insubordination in failing to comply with the transfer order despite his contentions that the transfer was improperly based upon his rights of free expression. (Record, pages 56-58.) And Superintendent Taylor's Affidavit not only rejected any obligation "to conduct a hearing at which sworn testimony by witnesses is necessary in order to demand a transfer of a teacher

BLEED THROUGH - POOR COPY

. . . ," but failed to indicate what kind of hearing, if any, he or the Board were prepared to offer or had offered to petitioner. (Record, page 58.)

Even in connection with the school board meetings of October 17 and 24, 1967, to which petitioner was invited, he was given no opportunity to prepare a defense--receiving less than 24 hours' notice of both meetings. (Record, pages 56-58.)

On the basis of these facts, the District Court in the present case made the following finding of fact (numbered 6) which is central to petitioner's claims respecting procedural fairness:

> [T]hat the Millard County Board of Education [after notifying petitioner that his contract would not be renewed and receiving petitioner's letter claiming an option to renew] took no further action toward employing or continuing in employment the plaintiff. That defendants further took no action toward giving to the plaintiff further or other notice, statement of problems or charges, statement of status, hearing

> or notice of hearing, or notice of decision of the Board signed by its President and Clerk, or otherwise.
>
> (Record, page 76, Appendix C-23A-24.)

The court held that there were no adequate hearings, also implying that neither were there adequate opportunities for hearing. (Record, page 58.)

An earlier Memorandum Decision referred to some proffers of notice and hearing, but that statement was made in the context of findings that there had been only "some varied meetings--some public and some 'executive'--as well as some correspondence" (Record, page 45), and that

> defendants took no further action toward giving plaintiff further or other notice, statement of problems or charges, statement of status, hearing or notice of hearing . . . .
>
> (Record, page 47.)

Finally, the court found that the Board "did not comply with <u>even one</u>" of the procedural steps recited in the Board's "Handbook of

Policy." (Emphasis supplied) (Record, page 50.) Regardless of what the Board's obligation to comply with the handbook may have been, the court's finding was that no adequate hearing or notice of hearing was offered. These findings were the basis of the district court's decision to grant summary judgment for petitioner.

On the original appeal to the Supreme Court of Utah, neither the parties nor the court specifically addressed themselves to the questions of petitioner's right of free speech; but the court held that petitioner's complaint failed to allege defective notice, lack of specification of charges, or failure to accord a hearing (23 Utah 2d 174, ___, 460 P.2d 336, 339 (1969), Appendix B-4.); but a review of the record and the facts of the case specifically refutes this conclusion. Rather than dealing with these important issues the court simply concluded

that the School Board had authority under its "Handbook of Policies" to require petitioner to transfer and to dismiss him for failing to do so.

Failing to consider the fundamental questions of free speech and due process, the court reversed the decision of the lower court and ordered that summary judgment be granted for respondents. (23 Utah 2d 174, 460 P.2d 336, Appendix B.)

Petitioner then filed a petition for rehearing. At this point the American Civil Liberties Union entered the case as amicus curiae. The amicus brief dealt solely with the infringement of petitioner's right of free speech and the Board's failure to comply with the requirements of due process. (See Brief of ACLU, as amicus curiae, pages 11-24, supplied with the Record.) In its opinion denying the petition for rehearing, the Supreme Court specifically held

that

> "the right of freedom of speech in a school teacher cannot prevent a school board from taking such action with respect to school personnel as in its judgment will most efficiently and properly fulfill its responsibility to the school district."
>
> [__ Utah 2d __, __ 463, P.2d 567, 568 (1970). Appendix A.

This decision also sustained the holding implicit in the court's prior decision that petitioner had not been denied due process of law.

The federal questions here presented were timely and properly raised and expressly decided on rehearing so as to give this Court jurisdiction on certiorari.

REASONS SUPPORTING ISSUANCE OF THE WRIT

I. THE BOARD OF EDUCATION MAY NOT CONSTITUTIONALLY DISMISS A TEACHER FOR REFUSAL TO COMPLY WITH SANCTIONS IMPOSED MERELY BECAUSE OF HIS "EXPRESSED DISAGREEMENTS" WITH FEDERAL AID PROGRAMS.

Vital interests of teachers and other citizens are at stake in this case. Unless the Court reviews this case and reverses the holding of the Supreme Court of Utah, ground gained by recent decisions of this Court will be lost for all teachers in the State of Utah and perhaps in other states as well. The Utah Supreme Court's disposition of this case by reversing summary judgment for the teacher and ordering that summary judgment be entered for the school board will suggest to every Utah trial court that school boards are granted wide power to discipline teachers summarily, even for their mere "expressed disagreements."

This Court has recently recognized the overwhelming importance of insuring the freedom of teachers in our public schools to speak freely on current issues so that others may be fully informed. Teachers are not required to reflect only those opinions held by their superiors. E.g., Pickering v. Board of Education, 391 U.S. 563 (1968); Keyishian v. Board of Regents, 385 U.S. 589 (1967). The holding of the Supreme Court of Utah is repugnant to the current decisions of this Court and will compel Utah school teachers to keep silent unless they are prepared to parrot the latest doctrinal line of the school board.

In denying the petition for rehearing the Utah court said that

> [s]urely the right of freedom of speech in a school teacher cannot prevent a school board from taking such action with respect to school personnel as in its judgment will most efficiently and properly fulfill its responsibility to the school district.

BEST AVAILABLE COPY

__ Utah 2d __, __, 463 P.2d 567, 568 (1970) (Appendix A).

But this Court has stated that any suggestion

> that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work . . . proceeds on a premise that has been unequivocally rejected in . . . decisions of this court.
>
> Pickering v. Board of Education, 391 U.S. 563, 568 (1968).

In rejecting the premise that public employers may require employees to relinquish constitutional rights, this Court has also said that

> [t]o state that a person does not have a constitutional right to [public] employment is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities.
>
> Slochower v. Board of Higher Education, 350 U.S. 551, 555 (1956).

Yet the only ground for petitioner's dismissal ever supported by any evidence was

his refusal to accept a transfer imposed as a sanction because of his articles and public stand on the subject of federal aid programs for schools. In no way did respondents show a failure by petitioner to meet any reasonable and lawful requirements of his employment. As a citizen and as an elected representative to the Utah State legislature petitioner had the right and privilege to speak out on matters of public concern without fearing the imposition of unreasonable sanctions by his public employer. His position as a teacher in the public schools where federal aid programs were being employed did not require him to relinquish his rights under the First and Fourteenth Amendments. Pickering v. Board of Education, 291 U.S. 563 (1968); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Pred v. Board of Public Instruction, 415 F.2d 851 (5th Cir. 1969); see Tinker v.

Des Moines School Dist., 393 U.S. 50 (1969); Swaaley v. United States, 376 F.2d 857 (Ct. Cl. 1967).

On two occasions only were any statements or evidence supplied relating to the reasons for petitioner's transfer and subsequent dismissal.

The first occasion was the letter of October 13, 1967, which recited the Board's decision to transfer petitioner and place him on probation. That letter declared the Board's action to be based on petitioner's "expressed disagreements with the policies and educational programs as adopted by the Board of Education" and his "refusal to cooperate." Second was the statement prepared by the principal of petitioner's High School, Mr. Golden P. Wright, submitted to the Board on October 27, 1967. Mr. Wright accused petitioner of "unprofessional disloyalty." But the only stated bases for this accusation were references to

petitioner's articles in state and local newspapers critical of various federally funded school programs.

Thus the only reasons for the attempted transfer and later dismissal, supported by any kind of evidence, were petitioner's exercise of First and Fourteenth Amendment rights. Although respondents claimed other reasons for the transfer and dismissal, those reasons always rested upon the Board's objections to petitioner's public stand on federal funding programs.

That no other incidents ever asserted as grounds for Board action were supported by any facts or evidence is shown by considering the vague assertion in the October 13 letter that petitioner's

> refusal to cooperate with the Board of Education and the teaching profession has caused teachers to fail to renew contracts . . . and has caused friction and unrest with other teachers in the district.

Never did the Board enumerate any instance

wherein petitioner failed to cooperate as a teacher. Because of the failure to clarify and state specific instances, petitioner never had an opportunity to refute the vague statement that he refused to cooperate. In fact, the only evidence available suggests that the cause of any disruption or failure of teachers to renew contracts was the principal's "witch hunt"--not the conduct of petitioner. (See letter from Charles R. Hencely, a former teacher, to Superintendent Taylor, indicating that this "witch hunt" was the primary cause of his failure to renew a teaching contract. (Letter to Talmage Taylor from Charles R. Hencely, included in Affidavit of Robert L. Steele, supplied with Record in Case No. 5752.)) As the allegation that petitioner was "uncooperative" was neither clarified nor supported by evidence, and appeared to rest

entirely upon petitioner's published statements and vocal disagreements, the only ground left to support the transfer, dismissal, and failure to renew petitioner's teaching contract, was in direct conflict with petitioner's rights of free expression.

This case is governed by Pickering v. Board of Education, 391 U.S. 563 (1968), holding that an Illinois school teacher could not be dismissed by the Board of Education for publishing in the local newspaper a letter criticizing the Board's handling of tax proposals for school revenues. Even though the article was directed toward school personnel and contained some false statements (facts not shown to be involved in the present case), the Court held that the teacher had merely exercized First Amendment rights and could not constitutionally be dismissed from his teaching position. The Court stated that funding of the school system is a matter of

public concern on which free and open debate is essential and that teachers, who should be well-informed on the subject, must be free to voice their opinions. The Court further held that in such cases--

> absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.
>
> 391 U.S. at 574.

The same reasoning applies to the present case. Use of federal aid programs in a school district is also a matter of legitimate public interest, and teachers involved closely with the programs should be free to publish their opinions. Petitioner merely exercised his First Amendment rights, and the Board of Education unconstitutionally attempted to transfer and then dismiss him because he exercised these rights. School officials do not have the right to jeopardize the employment of a teacher in order

to suppress "expressions of feelings with which they do not wish to contend." See Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966). Evidence that the reason for the transfer was petitioner's expression of such views is supplied by the statement of Principal Wright wherein he said that it "was disconcerting and frustrating to have these federal aid programs undermined in Mr. Brough's articles . . . ."

The Board argues that petitioner was dismissed for insubordination in failing to comply with the Board of Education's request to transfer. But this argument must fall because the charge of insubordination is based upon his refusal to comply with the demand to transfer, which was unconstitutionally imposed as a disciplinary sanction upon the exercise of rights of free expression. Because the Board could not constitutionally seek petitioner's

transfer for exercising his First and Fourteenth Amendment right to free speech, it could not then dismiss him for insubordination in failing to comply with the demand.

Respondents may argue that this case deals only with the School Board's refusal to offer petitioner a contract to teach for the 1968-69 school year and not with the prior attempt to dismiss, but such a stand would be inconsistent with respondents' briefs on appeal to the Supreme Court of Utah. In any event, the letter of February 16, 1968, notifying petitioner that he would not receive a contract for the 1968-69 school year clearly shows that the grounds for that action remained exactly the same as the grounds for the Board's earlier action. The letter stated only that "[d]ue to the difficulties which we have encountered and because of the unrest in the school" a contract would not

be offered. There is no new statement of grounds but merely a reference back to the reasons for the earlier Board actions--the unconstitutional attempt to dismiss based upon the exercise of free speech rights. Neither can it be argued that the Board of Education may decline to give reasons for refusing a contract, because petitioner was a career teacher and was given the option, under Section III-C-3 of the School Board's Handbook of Policies, to renew his contract each year, a substantive right which cannot be taken from him without constitutionally-satisfactory cause.

Surely this Court will want to assure that its holdings protecting teachers' rights of speech are not undermined by this obvious imposition of sanctions for a teacher's reliance upon those rights. And where the state court expressly disposed of First Amendment rights in such summary

fashion, no objection to review should result from the fact that the issues arose on rehearing.

II. MEETINGS HELD BY THE BOARD OF EDUCATION FAILED TO PROVIDE ANY OPPORTUNITY TO REFUTE SPECIFIC CHARGES OR ANY OTHER INGREDIENT OF A FAIR HEARING THAT WOULD SATISFY DUE PROCESS OF LAW AS REQUIRED BY THE FOURTEENTH AMENDMENT.

The School Board's action in this case fatally suffers from a second constitutional infirmity, in addition to the denial of petitioner's First Amendment rights. The Board's action was also invalid because it was taken without affording any hearing sufficient to meet the requirements of due process under the Fourteenth Amendment. The assertion in the Utah Supreme Court decisions that petitioner failed to allege a denial of due process is unfounded, and that court's holding constitutes reversible error.

Respondents contend that the meetings to which petitioner was invited in connection with the attempted transfer were "hearings;" but these meetings fell far short of the requirements of due process, as well as the requirements of the school district's own Handbook of Policies and Procedures. Because the Board has adopted hearing procedures for dismissing "career teachers" and because the Board makes binding determinations affecting the legal rights of persons, due process requires that certain fundamental procedures must be met. A brief examination of the record reveals that the school board meetings failed to satisfy even the following basic requirements of a fair hearing: (1) a clear statement of reasons for transfer or dismissal so that the accused knows the charges against him; (2) notice that a hearing is to be held, given sufficiently in advance

of the hearing to allow time for preparation of a defense; (3) opportunity to confront witnesses and opportunity to present witnesses. Willner v. Committee on Character & Fitness, 373 U.S. 96, 103 (1963); Greene v. McElroy, 360 U.S. 474 (1959); Birnbaugm v. Trussel, 371 F.2d 672, 678 (2d Cir. 1966); Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961); Lucia v. Duggan, 303 F.Supp 112 (D. Mass. 1969); Esteban v. Central Missouri State College, 277 F.Supp. 649 (W.D. Mo. 1967); see Hannah v. Larche, 363 U.S. 420 (1960). An examination of the facts conclusively shows that in the present case none of these procedures was met.

In May of 1967 petitioner, a "career" teacher, had signed a contract to teach at Millard High School. On October 13, 1967, nearly two months after school had started and without any prior notice or hearing,

petitioner was notified that the Board of Education had placed him on probation and had ordered him to transfer immediately to a junior high school in another town as the junior member of a team-teaching unit. Because this substantial change in his teaching contract was explained only on the grounds of his public disagreement with policies respecting federal aid to education, petitioner and his attorney immediately advised the defendants that they considered the Board's action a breach of his contract and requested a fair hearing before any changes were made in his employment. Petitioner further informed respondents that until he received such a hearing he would not comply with their request, but would remain ready, willing, and able to perform his original contract.

On October 16, 1967, petitioner was informed by letter that because he had not

complied with the wishes of the Board there was to be a special meeting at 10:00 a.m. on October 17, 1967, to consider the matter. It has been contended that this meeting constituted a hearing, but an examination of the facts reveals that not one of the basic requirements of due process was met.

First, the letter of October 16 provided no further statement of the reasons or charges upon which the probation and transfer were based. Thus, petitioner could rely only upon the extremely vague reference in the October 13 letter to his disagreement with various programs and his uncooperative attitude. This statement provided no indication of the particulars or instances indicating such an attitude nor did it explain what was meant by the reference to his "expressed disagreements" with school policies and programs. No one

could be expected to prepare a defense upon such a vague and incomplete statement of charges. And in view of the First Amendment implications of the charges, petitioner could only speculate as to any additional unstated facts thought to remove his conduct from First Amendment protection.

Second, petitioner was not informed that this would be a hearing in which he would be allowed to present a defense. He was told only that the meeting had to do with the problem of his employment and that he was invited. There was neither an invitation for an attorney nor any indication that petitioner would be allowed to present any defense. In addition, the notice of the meeting was given less than one day in advance, while due process requires sufficient time to prepare a defense.

Third, and most important, at no time during the meeting was petitioner given an

opportunity to either confront or cross-examine any witnesses against him. The closest thing to confrontation occurred when Talmage Taylor, superintendent of schools, charged petitioner with being uncooperative with the Board and with the school; but he presented no specific assertions susceptible of rebuttal. Petitioner denied the charges, but no opportunity for cross-examination or presentation of evidence was afforded. Finally, since there was no indication that there would be any opportunity to present evidence and because of the short notice, petitioner was unable to present witnesses in his own behalf or prepare any other defense; therefore he again requested a fair hearing.

Following the October 17 meeting the Board of Education did not alter its position as to the transfer, and petitioner still refused to comply until he had a fair

chance to be heard. The Board then sent another letter to him apprising him that another meeting had been scheduled for 9:00 a.m. on October 27, 1967. Petitioner received this letter on October 26, the day before the scheduled meeting; and again the meeting was characterized by the same failures to satisfy due process requirements. Again there was no attempt to clearly set forth the charges or reasons for transfer. The letter contained nothing but a brief statement that a meeting was scheduled for the next morning regarding the problem of petitioner's employment and that he and his attorney were invited. Petitioner remained in the dark as to the charges against him and as to whether this was supposed to be a hearing in which he could present his own witnesses or other defenses. Even had he known, it would have been of little help as he was again given less than one day's notice.

The only difference in the October 27 meeting from the October 17 meeting was a brief opportunity to confront one witness.

At the beginning of the meeting petitioner was required to wait outside for more than an hour while the Board met with various citizens. After petitioner was invited in, one witness (Golden P. Wright) did return to the meeting, at which time he read a prepared statement supporting the Board's action. (Record, page 56; exhibit p.4 in Case No. 5721, incorporated as an exhibit in the present case.) Following this, petitioner's attorney began to address questions to Mr. Wright, but this attempt was unsuccessful, as shortly the meeting was adjourned until later in the day. Neither petitioner nor his attorney were invited to return. Not only was the opportunity to confront this single witness so limited as to be of no value, but petitioner had no

opportunity to present any witnesses in his own behalf.

When the Board met later that day, out of the presence of petitioner, they voted to dismiss him for "insubordination" for his failure to obey their order of transfer. This action cannot be upheld in the absence of a fair hearing to determine the validity of the order to transfer, which, coupled with the "probation," was obviously imposed as a disciplinary sanction. Both the School District Handbook of Rules and Procedures and due process require such a hearing. As neither of the meetings complied with due process requirements, it is clear that petitioner's repeated requests for a fair hearing were never met.

In the spring of 1968 no meetings of any kind were held in connection with the Board's refusal to offer a teaching contract to petitioner for the 1968-69 school

year. Since petitioner was still a "career teacher," this attempted dismissal without a hearing was ineffective, for under his contract he still retained the option to renew his contract for the coming year. That option was exercised by sending a letter to the Board of Education on March 10, 1968, advising it that he was exercising his option to renew. By this action he had fulfilled his duty in connection with a contract for the coming year; and when the Board thereafter failed to comply by sending a contract or further employing or allowing him to teach, as found by the the District Court, the Board was guilty of a breach.

Since petitioner had taken what action he could, if the Board did have any reasons upon which it could rely to strip petitioner of his status as a career teacher, the failure to notify him of specific charges

against him, set up a time for a hearing, submit evidence against him, permit cross-examination, or at least an opportunity to refute specific evidence, violated the essential requirements of due process of law as well as the Board's own procedural rules.

Although the first opinion of the Supreme Court of Utah in this case indicates that petitioner may have been tendered a hearing, examination of the facts and the express findings and conclusions of the District Court demonstrate that the purported "hearings" were nothing more than ordinary school board meetings at which vague charges were hurled without any opportunity to consider or respond to substantiating evidence. In addition, respondents claimed that they stood ready to give notice of charges and a hearing after advising petitioner that they would not renew his contract; but the obligation was upon them to provide a hearing--not merely to

BLEED THROUGH POOR COPY

state that they were ready to give notice after dismissal had already been imposed. The failure to take any action toward giving notice, suggesting a hearing procedure, setting a time for hearing, or otherwise providing an opportunity to rebut specific evidence, indicates that the Board's statements were made only for the purpose of building a record.

As the attempted dismissal of petitioner in the fall and again in the spring failed to meet the most basic procedural requirements of due process it cannot be upheld.

CONCLUSION

The claim that petitioner was dismissed for "insubordination" resulting from his refusal to accept the Board's imposition of sanctions melts before an examination of the facts. First, it is clear that petitioner was never given an opportunity to refute any specific charges giving rise to the

sanctions he resisted. But more important, an analysis of the purported charges suggests why the Board took no action to provide a hearing: the charges were based entirely upon petitioner's exercise of rights of free speech. For these reasons it is respectfully submitted that this Court should grant the petition for a writ of certiorari.

I. DANIEL STEWART, JR.

WILLIAM J. LOCKHART
Cooperating Attorneys
American Civil Liberties Union
College of Law
University of Utah
Salt Lake City, Utah

WALTER R. ELLETT
5085 South State
Murray, Utah

Attorneys for Petitioner

CERTIFICATE OF SERVICE

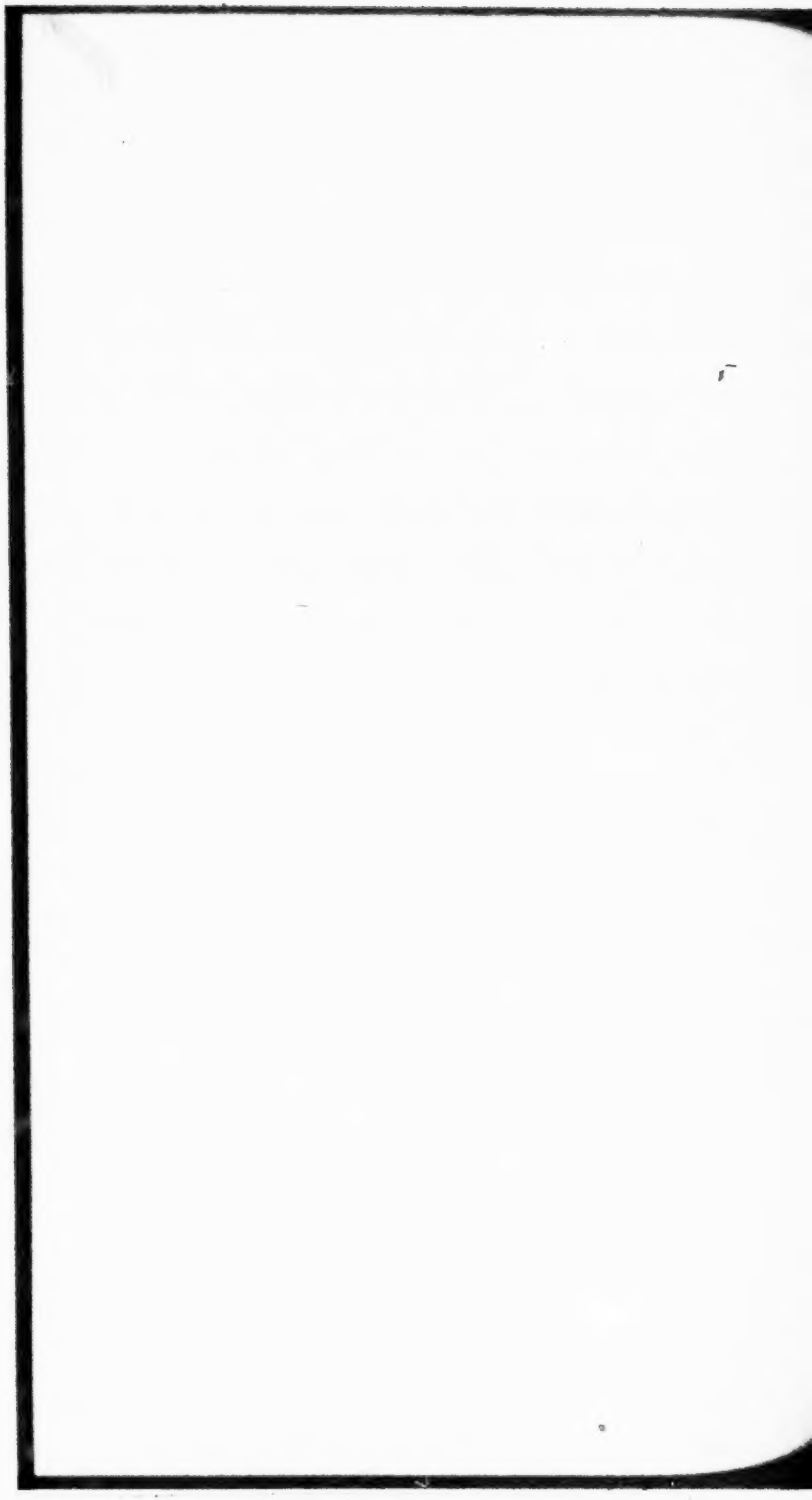
I hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been served upon all of the parties to this action required to be served by placing a copy of the Petition in an envelope, postage prepaid, and depositing said copy in the mails, addressed to each of the following counsel of record for the defendants herein:

Richard H. Nebeker
Cannon, Greene, Nebeker & Horsley
400 Kennecott Building
Salt Lake City, Utah 84111

Thorpe Waddingham
Delta, Utah

A notice of my appearance as counsel of record in this action also accompanies the filing of this petition.

I. Daniel Stewart, Jr.



FILTERED THROUGH POOR COPY

APPENDIX A

[463 P.2d 569(1970)]

Richard M. BROUGH, Plaintiff
and Respondent,

v.

THE BOARD OF EDUCATION OF MILLARD COUNTY SCHOOL DISTRICT, Jack Nelson, Delma Jean Galli and Gerald B. Huff, members of the Board, and Talmage Taylor, Superintendent, Defendants and Appellants.

No. 11710.

Supreme Court of Utah.

Jan. 8, 1970.

Action by teacher against members of board of education and superintendent to restrain defendants from transferring him from teaching position, from terminating his employment, or removing him from payroll. The Fifth District Court, Millard County, C. Nelson Day, J., entered judgment requiring board to reinstate plaintiff and to pay him what his salary would have been for school year, and defendants appealed. The Supreme Court, 460 P.2d 336,

FILTER THROUGH POOR COPY

remanded with directions to enter summary judgment for defendants. On plaintiff's petition for rehearing, the Supreme Court, Harding, District Judge, held that it was prerogative of defendants to transfer teacher to another school after teacher had refused to attend school workshop using federally financed materials because of aversion to use of federal funds in public school, and to regard refusal of transfer as insubordination justifying dismissal.

Petition denied and order of remand affirmed.

1. SCHOOLS AND SCHOOL DISTRICTS 141(1,4)

Board of education and superintendent had perrogative to order transfer of teacher to another school after teacher had failed to attend school workshop using federally financed materials because of aversion to use of federal funds in public schools, and

to regard refusal of transfer as insubordination justifying dismissal.

2. SCHOOLS AND SCHOOL DISTRICTS 141(5)

So long as action of board of education and superintendent in treating teacher's refusal to transfer to another school as insubordination justifying dismissal was not capricious, arbitrary or unreasonable, it was not prerogative of court to interfere with it.

Thorpe Waddingham, Delta, Richard H. Nebeker, of Cannon, Green, Nebeker & Horsley, Salt Lake City, for defendants and appellants.

Walter R. Ellett, Murray, for plaintiff and respondent.

HARDING, District Judge.

The court recognizes that a school teacher has the same right to freedom of speech under

the Constitutions of the United States and of the State of Utah as any other person. However, the exercise of this right is not without its consequences.[1] Surely the right of freedom of speech in a school teacher cannot prevent a school board from taking such action with respect to school personnel as in its judgment will most efficiently and properly fulfill its responsibility to the school district.

[1,2] Plaintiff had failed to attend a school workshop for teachers at the beginning of the school year where Federally financed materials were to be used and demonstrated. He was undoubtedly entitled to his freedom of thought and of speech in regard to his declared aversion to the use of federal funds in the public schools.

---

1. Justice Holmes in Schenck v. United States, 249 U.S. 47, 52, 39 S.Ct 247, 63 L.Ed. 470 (1919).

However, his opposition and refusal to cooperate in carrying out the policies determined by those charged with the duty of administering school affairs was a factor which those officials could properly consider in fulfilling their responsibilities. Just what all the considerations were which resulted in their judgment that the plaintiff should be transferred from the Millard High School to a team teaching position in the Delta Junior High School at the same salary is not our concern. It was their perrogative to make that determination. They directed the plaintiff to transfer. He refused. This refusal was reiterated in the presence of the Board of Education at two of its meetings. This was conduct which the Board could reasonably regard as insubordination justifying his dismissal; and so long as that action was not capricious,

arbitrary or unreasonable it is not the prerogative of the court to interfere with it.[2]

The petition for rehearing is denied.

CROCKETT, C. J., and TUCKETT, J., concur.

HENRIOD, Justice (concurring).

I concur in denying the petition for rehearing because I am of the opinion that the brief of amicus curiae presents nothing but new and different points never considered on appeal by any of the counsel who initiated or argued that appeal. Counsel for amicus curiae, therefore, having no standing before this court for the purpose of raising new issues entirely foreign to appellate procedure.

CALLISTER, J., concurs in the views expressed by Mr. Justice Henroid.

ELLETT, J., having disqualified himself does not participate herein.

---

2. See Board of Education, City of Los Angeles v. Swan, 41 Cal.2d 546, 261 P.2d 261; Lake Shore Motor Coach Lines v. Welling, 9 Utah 2d 114, 339 P.2d 1011.

BLEED THROUGH POOR COPY

APPENDIX B

[460 P.2d 336 (1969)]

Richard M. BROUGH, Plaintiff
and Respondent,

v.

THE BOARD OF EDUCATION OF MILLARD COUNTY SCHOOL DISTRICT, Jack Nelson, Delma Jean Galli and Gerald B. Huff, members of the Board, and Talmage Taylor, Superintendent, Defendants and Appellants.

No. 11710.

Supreme Court of Utah.

Oct. 27, 1969.

Action by teacher against members of Board of Education and Superintendent to restrain defendants from transferring him from teaching position, from terminating his employment, or removing him from payroll. The Fifth District Court, Miller (sic) County, C. Nelson Day, J., entered judgment requiring Board to reinstate plaintiff and to pay him what his salary would have been for school year and defendants appealed. The Supreme Court, Harding, District Judge, held that under regulations

COPY PRINTER CLOSE TO EDGE

of school board providing that teacher may be discharged for insubordination, and providing that transfers may be made upon initiative of administrative officer in order to serve best interest of employee or schools, teacher was obliged to accept transfer when reasonably requested to do so, and refusal constituted insubordination for which contract was properly terminated.

Remanded with directions.

SCHOOLS AND SCHOOL DISTRICTS 141(1,4)

Under regulations of school board providing that teacher may be discharged for insubordination, and providing that transfers may be made upon initiative of administrative officer in order to serve best interest of employee or schools, teacher was obliged to accept transfer when reasonably requested to do so, and refusal constituted insubordination for which contract was properly terminated. U.C.A.1953, 53-6-20.

Thorpe Waddingham, Delta, Cannon, Greene, Nebeker & Horsley, Richard H. Nebeker, Salt Lake City, for appellants.

Walter R. Ellett, Salt Lake City, for respondent.

HARDING, District Judge:

In October, 1967, the plaintiff was, and for several years prior thereto had been, a career teacher at the Millard High School, Fillmore, Utah, under a contract with the Millard County School District. He was also a member of the Utah House of Representatives. He held and expressed strong opinions against the use of Federal Aid to Education programs in the public schools, some of which programs were in use in the Millard County Schools. This caused friction between him and other school personnel at the school where he taught. On October 13, 1967, by order of the Superintendent of the School District, plaintiff

was directed to transfer from the Millard High School to the Delta High School in the same district. He refused to accept the transfer. After two meetings with the Board concerning the matter, and his continued refusal to transfer, his services were terminated because of insubordination, by a letter dated October 27, 1967. Three days later he filed suit (Civil No. 5721) against the defendants to restrain them from transferring him from his teaching position at the Millard High School, from terminating his employment, or removing him from the payroll. The court issued a temporary restraining order "during the pendency of this action," which frustrated the will of the defendant Board from the date of its issuance in October until the latter part of the following March, when the Board decided it would be detrimental to the welfare of the school to remove the plaintiff from

his classroom at that time and he should be permitted to remain until the end of the school year. The defendants thereupon moved that the preliminary injunction be made "permanent for the term of the plaintiff's present appointment as teacher in the Millard School District" which was for the remainder of the school year.

In the meantime, on February 16, 1968, the Board had notified plaintiff that "because of the difficulties encountered" he would not be offered a contract for the coming school year. He was tendered a hearing by the Board regarding the situation. He did not avail himself thereof but instead filed the present action, Civil No. 5752.

He performed no services for the Millard County School District during the 1968-1969 school year.

After the defendants had answered, mo-
ons for summary judgment were filed by
th sides. The court awarded judgment to
plaintiff, requiring the defendant
rd to reinstate plaintiff as a career
cher in the Millard High School, and to
him what his salary would have been
the 1968-69 school year.

From this judgment and decree the
fendants appeal.

Regulations concerning teacher tenure
the manner of his discharge are left to
boards of education by virtue of Sec-
n 53-6-20, U.C.A. 1953, as amended,
ch states in part:

> Every board of education . . . may do all things needful for the maintenance, prosperity and success of the schools, and the promotion of education; and may adopt by-laws and rules for its own procedure, and make and enforce all needful rules and regulations for the control and management of the public schools of the district.

Pursuant to this statutory authority,
defendant Board adopted rules and

BLEED THROUGH, POOR COPY

regulations, of which the following are pertinent to this case:

Section 11-A

10. He (the Superintendent) shall assign all teachers to their schools, and make such changes in position as appear to be in the best interest of the schools. As far as possible, grade assignments will be made at the time contracts are issued. He may change teachers from one school to another or from one grade to another as may seem advisable.

Section 111-C

3. After a qualifying teacher completes three consecutive years of successful teaching experience in the Millard School District, he becomes eligible for employment as a "career teacher." The person employed as a career teacher has the option of renewing his contract of employment for the succeeding year, or years, in keeping with the policies of the school district. The career teacher's contract for employment for a current year may be terminated for cause, but only in the manner hereinafter provided for in these policies.

7. The teacher agrees to perform faithfully the duties assigned to him to the best of his ability under the control, direction, and guidance of the Superintendent, and to be subject to the rules and

regulations defined in this handbook, and to meet all appointments and attend such meetings as may be arranged by the Superintendent of Schools.

8. A teacher may be discharged at any time for immorality, insubordination, or mental or physical incapacity, provided he shall not be discharged during the term of his appointment without a thorough investigation and a hearing at which he shall be given an opportunity to be heard. . . .

Section 111-D

4. Transfers may be made at the request of the employees or upon the initiative of the Superintendent or other administrative officer for reasons which, in the judgment of the Superintendent, shall serve the best interest of the employee and/or the schools. All requests for transfer shall be made in writing.

6. When a transfer is advisable, the employee shall be given the right and courtesy of an interview in which the reason for the said transfer shall be explained and discussed.

The plaintiff cites other regulations concerning dismissal for incompetency, but we consider them inapplicable to this fact situation.

It is evident from the foregoing statutory authority and the rules and regulations of the defendant Board, all of which are a part of the plaintiff's teaching contract, that he was obliged to accept a transfer when reasonably requested to do so, and that he would be guilty of insubordination upon refusal. His contract was properly terminated for such refusal.[1] Despite the termination, he was kept in his teaching position and on the payroll until March 25, 1968, by a court order, to which defendants yielded obedience. However, the defendants at no time rescinded the termination order. In March, 1968, they expressly assented to his remaining to the end of the school year, but that was the extent of

---

1. For an able exposition of the issue here involved see Board of Education of City of Los Angeles v. Swan, 41 Cal.2d 546, 261 P.2d 261.

such acquiescence. At such time notice had already been given him that his contract would not be (and still has not been) renewed. His complaint asserts no allegation of defective notice or lack of specification of reasons for refusal to renew his contract, or failure to accord him a hearing thereon.

There being no genuine issue of material fact, defendants' motion for summary judgment should be granted.

We, therefore, remand this case to the trial court with directions to set aside the summary judgment granted to the plaintiff and to enter a summary judgment in favor of the defendants on all issues presented. Costs are awarded to defendants.

CROCKETT, C. J., and CALLISTER, TUCKETT, AND HENRIOD, JJ., concur.

ELLETT, J., having disqualified himself, does not participate herein.

APPENDIX C

IN THE FIFTH JUDICIAL DISTRICT COURT,

IN AND FOR MILLARD COUNTY,

STATE OF UTAH

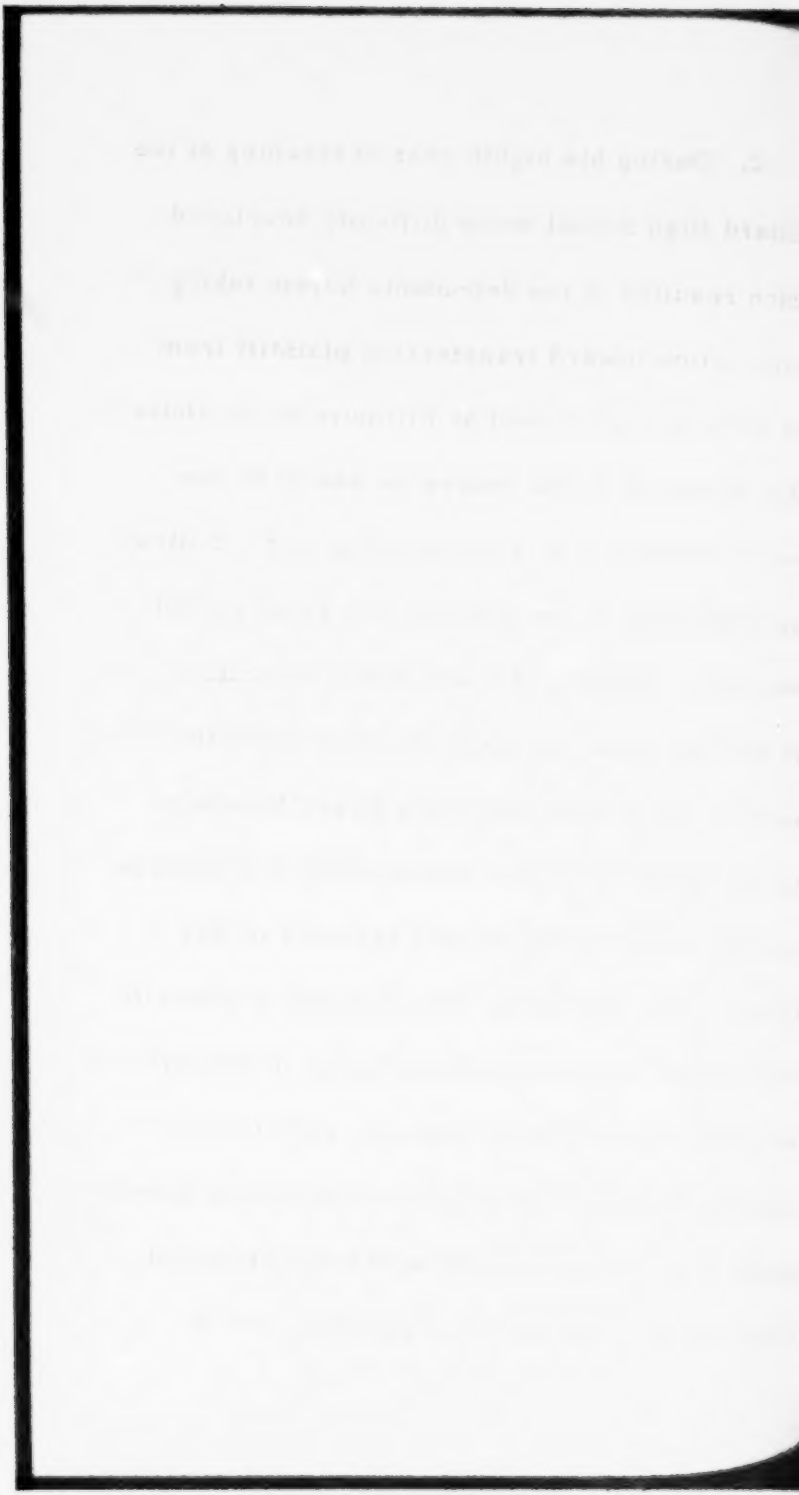
RICHARD M. BROUGH,	)	
	)	
Plaintiff,	)	MEMORANDUM
	)	DECISION
- vs -	)	
	)	
THE BOARD OF EDUCATION OF MILLARD COUNTY SCHOOL DISTRICT, JACK NELSON, DELMA JEAN GALLI and GERALD B. HUFF, members of the Board, and TALMAGE TAYLOR, SUPERINTENDENT,	)	Civil No. 5752
	)	
Defendants.	)	

This matter is before the Court for consideration of plaintiff's motion for summary judgment as to the First Cause of Action in his complaint herein and as prayed for in paragraph 1. of the prayer of said complaint, i.e. that he be continued

in his employment as a career teacher at the Millard High School at Fillmore, Utah. At the hearing on said motion, it was indicated through his counsel, that upon the granting of said motion, plaintiff would not pursue the claims for damages as contained in the second and third causes of action alleged in the said complaint. The matter has been argued by counsel as to the facts and the law. The Court having considered the matter and being fully advised in the premises, finds, concludes and orders as follows:

1. The plaintiff, a duly qualified secondary teacher and the holder of a current certificate in the area of Secondary Education issued by the Utah State Board of Education, had been employed by the Board of Education of the Millard County School District for more than seven years consecutively at the Millard High School at Fillmore, Utah.

2. During his eighth year of teaching at the Millard High School some difficulty developed which resulted in the defendants herein taking some action toward transferring plaintiff from the Millard High School at Fillmore to the Delta High School at Delta, where he was to be the junior member of a team-teaching unit. Following objections by the plaintiff and some varied meetings - some public and some "executive" - as well as some correspondence between the parties, the named defendant Board Members as the majority of said Board voted to discharge the plaintiff who then filed a law-suit in this Court, Civil No. 5721, with himself as plaintiff and against the same defendants as in this present and above entitled lawsuit, such former lawsuit being for the purpose of enjoining defendants from going forward with their proposed transfer or termination of plaintiff, and to



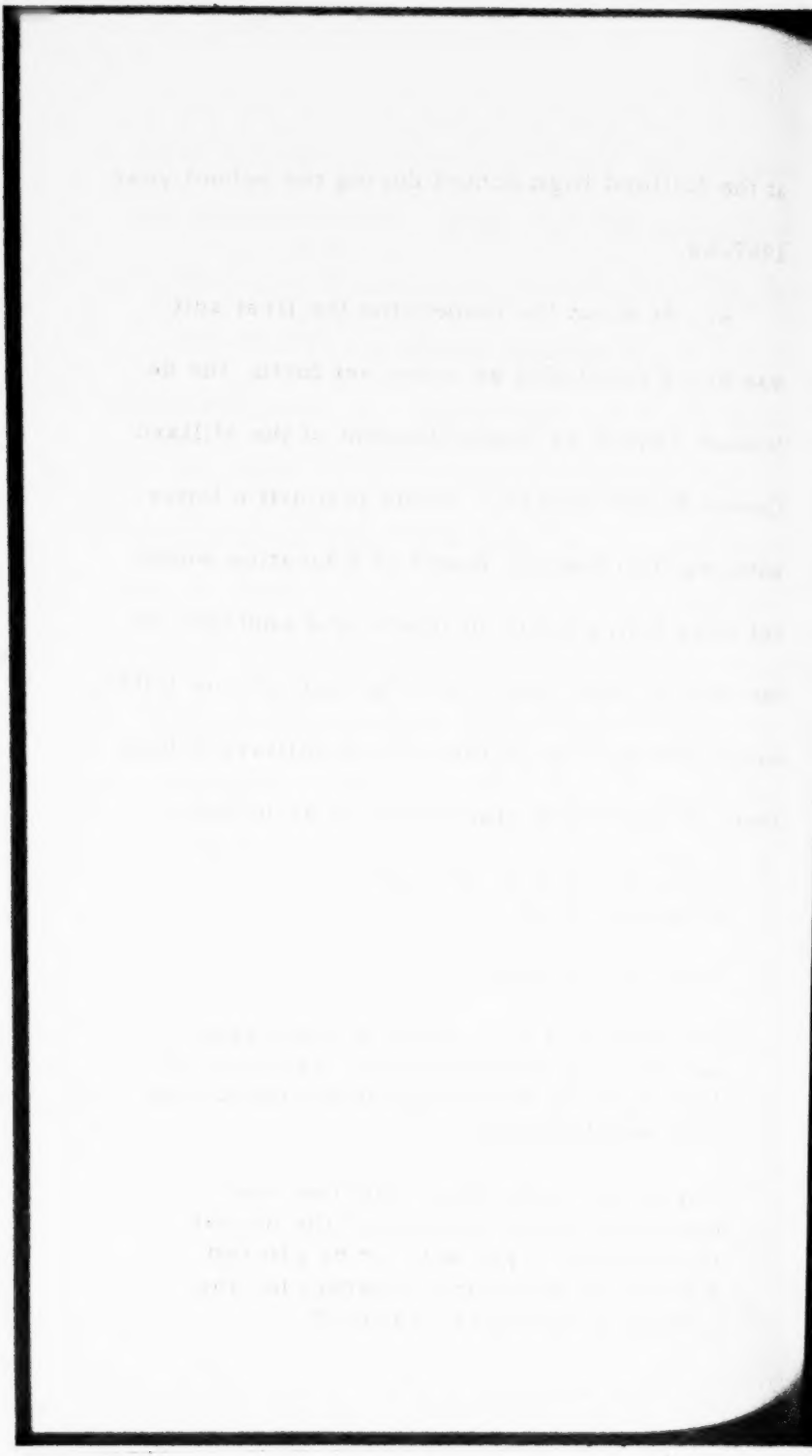
require that he be reinstated or continued in his then teaching status and position at Millard High School. A claim for damages was also made.

3. A Temporary Restraining Order was issued, which upon hearing was made permanent pending the trial of the matter, precluding the defendants in that former action from transferring the plaintiff, from preventing plaintiff from carrying out his duties as a teacher, from terminating him or failing to pay him at the contract rate for his services. After further motions, pleadings and attempts at settlement of the said former matter, at a subsequent hearing it was agreed by the parties and counsel for defendants then moved the Court to make the preliminary injunction permanent for the school year 1967-68 and to then dismiss with prejudice the alternative claim for damages. The Court so ordered, and plaintiff continued his teaching

at the Millard High School during the school year 1967-68.

4. At about the same time the first suit was being concluded as above set forth, the defendant Taylor as Superintendent of the Millard County School District, wrote plaintiff a letter advising him that the Board of Education would not offer him a letter of intent or a contract for the coming year 1968-69. The body of this letter, which was written on the regular Millard School District letterhead stationery, is as follows:

> "Mr. Richard M. Brough
> Fillmore, Utah
>
> Dear Mr. Brough:
>
> The Board of Education, at their regular meeting held Thursday, February 15, 1968 took the following action concerning your employment:
>
> Due to the difficulties which we have encountered and because of the unrest in the school, you will not be offered a letter of intent or a contract for the coming school year, 1968-69.



BLEED THROUGH POOR COPY

If you have any questions or would like to meet with the Board of Education, concerning this matter, please contact me and I will make arrangements for you to meet with them.

Thank you.

Sincerely,

/s/ Talmage Taylor
Talmage, Taylor,
Superintendent"

5. The plaintiff then wrote to Superintendent Taylor with copies of his such letter being sent to three of the school board members including defendant Nelson who was President of the Board, advising that as a "career teacher" he claimed and thereby exercised his option to renew his contract of employment for the succeeding year, referring to the Millard County Board of Education Policy Handbook, Section III C3.

6. No further action was taken by the named defendants toward employing or continuing in employment the plaintiff. Also defendants

took no further action toward giving plaintiff further or other notice, statement of problems or charges, statement of status, hearing or notice of hearing, or notice of decision of the Board signed by its President and Clerk or otherwise. It should be noted however, that on a number of occasions including during the course of proceedings in the Courtroom, counsel for defendants advised the plaintiff and his counsel that the Board and the other named defendants stood ready to give plaintiff any notice he desired or to hold any hearing he desired.

7. The defendants did employ other teachers who have been and are assigned to teach the classes formerly taught by plaintiff at Millard High School, and plaintiff has been and is precluded by the named defendants from teaching

at Millard High School in his former classes and status or at all.

8. The plaintiff has brought the present action to require defendants to continue him in his teaching position at Millard High School and to have them enjoined from terminating him or changing the circumstances of his employment or to fail to pay him for his services which he stood and stands ready to provide.

9. The parties have stipulated that they are bound by the provisions of the "MILLARD SCHOOL DISTRICT, HANDBOOK OF POLICIES, RULES AND REGULATIONS 1966", which in pertinent part reads as follows:

> "PURPOSES OF THIS HANDBOOK * * (to) create the framework and determine the means and the limits that provide direction to all persons who participate in school affairs.

"DEFINITION OF TERMS

Career Teacher is a certified teacher with three or more years experience in Millard School District.

Orderly Dismissal is a process through which a career teacher's employment can be terminated by the employer.

SECTION III C. APPOINTMENTS AND CONTRACTS

3. After a qualifying teacher completes three consecutive years of successful teaching experience in the Millard School District, he becomes eligible for employment as a "career teacher." The person employed as a career teacher has the option of renewing his contract of employment for the succeeding year, or years, in keeping with the policies of the school district. The career teacher's contract for employment for a current year may be terminated for cause, but only in the manner hereinafter provided for in these policies.

SECTION IV B. ORDERLY DISMISSAL

The contract of a career teacher shall be terminated only in the following manner:

1. Where there is evidence of failure in his regular professional work, or where there are other grounds for dismissal, the teacher shall be given a written notice of the fact stating clearly his problem or problems. This notice will be given as early as evidence is available but not later than

December 1 of the school year. This notice must be in writing, and may be given by the principal, Superintendent, or another of the administrative personnel designated by the Superintendent. The notice shall state the charges and give assurance of providing a definite plan for teacher improvement. These personnel sources of help, basically, should be the school principal, the Superintendent, any or all other administrative and supervisory personnel, and the teachers within the school building wherein he is teaching. As part of the corrective program the career teacher shall suggest the personnel that are to give assistance.

2. Not later than February 1 of the school year the career teacher whose success is being questioned shall receive in writing a complete analysis of his work. This shall be signed by the school principal and the Superintendent of schools. Therewith a conference shall be held and additional plans designed for correction and helpfulness to the career teacher. No later than February 15, the career teacher, the school principal, and an additional administrative or supervisory person shall hold a conference for further analysis of a program for improvement.

3. By March 15, the career teacher must receive from the Superintendent of schools a written statement. This statement shall clearly specify the teacher's status within the school district. If progress has been made the teacher will be so informed.

Therewith additional plans will be given. If substantial progress has been made, the Superintendent of school shall notify the career teacher that he will be awarded a contract for the following year.

4. In order to terminate the contract of the career teacher, the Superintendent shall by March 15 give formal written notice of intent to cancel the contract at the end of the school year. The notice shall review the case and inform the teacher of his rights for a hearing before the Board of Education.

5. Within ten days after receiving the notice, the Superintendent shall be informed of the teacher's intent to accept the cancellation of the contract or to request a hearing before the Board of Education. If the teacher elects a hearing, a time and place for the hearing shall be established by the Superintendent and the teacher shall be given notice thereof. The president of the Board shall direct the hearing. The career teacher is entitled to any or all witnesses that he may choose. He may have legal counsel.

6. Within five days after the hearing, the career teacher shall receive the decision of the Board. Such notice shall be in writing and be signed by the president and clerk of the Board.

7. If the career teacher believes that the decision is a violation of justice or that additional evidence of his success has become available, he may request another hearing

before the Board of Education. The second hearing shall proceed in a manner similar to the first.

8. The decision of the Board of Education will be final.

10. While much latitude must be permitted those who conduct the affairs of a school district, certainly they must be required to at least reasonably comply with the provisions of their handbook of policy with regard to the termination of employment for a career teacher. In this case it appears that the defendants being charged with such responsibility did not comply with even one of the first seven numbered paragraphs under the heading "Orderly Dismissal" in the Handbook of Policy, and their attempted dismissal of plaintiff was ineffectual and without proper or legal basis.

11. Plaintiff, being entitled thereto, had exercised his option for continuation of his

employment as a career teacher at Millard High School for the school year 1968-69.

12. There is no genuine issue as to any material fact and the plaintiff is entitled to judgment as a matter of law for the relief claimed in Paragraph 1 of the prayer of his Complaint. Counsel for plaintiff is directed to prepare appropriate Findings, Conclusions and Decree.

Dated this 14th day of March 1969.

_____
District Court Judge

Copies to:

Mr. Mark E. Anderson, Esq., 1429 South 15th East, Salt Lake City, Utah

Mr. Walter R. Ellett, Esq., 5085 South State, Murray, Utah 84107

Mr. Thorpe Waddingham, Esq., Delta, Utah 84624

Mr. A. M. Ferro, Esq., Walker Bank Building, Salt Lake City, Utah 84111

IN THE FIFTH JUDICIAL DISTRICT COURT,

IN AND FOR MILLARD COUNTY,

STATE OF UTAH

RICHARD M. BROUGH,	)	
	)	
Plaintiff,	)	MEMORANDUM DECISION
	)	and
-vs-	)	ORDER
	)	
THE BOARD OF EDUCATION OF MILLARD COUNTY SCHOOL DISTRICT, et al,	)	Civil No. 5752
	)	
Defendants.	)	

This matter came regularly before the Court this 29th day of May 1969 for hearing on various motions filed herein by counsel for the defendants. The plaintiff was present in person and represented by his attorney, Walter R. Ellett, Esq., and Jack Nelson, the President of the School Board, Talmage Taylor, the Superintendent of Schools, were also present in person and represented by Thorpe Waddingham, Esq., and

Richard H. Nebeker, Esq., their attorneys who represented all defendants. The court approved Mr. Nebeker's association with Mr. Waddingham as counsel for the defendants.

The matters and motions were argued at length and finally submitted to the court for determination, based upon the records and files, the affidavits filed herein, the depositions taken in this matter - all of which were ordered published, and Civil No. 5721, the case of Richard M. Brough vs The Board of Education of Millard County School District, et al, in this Court, which upon motion of Mr. Nebeker was received as evidence in the present matter.

The Court now being fully advised in the premises, finds, concludes and orders as follows:

1. The Motion to consolidated this present case No. 5752 with the former case No. 5721 is denied, although that former file in its entirety

is received as an exhibit and evidence in this present case.

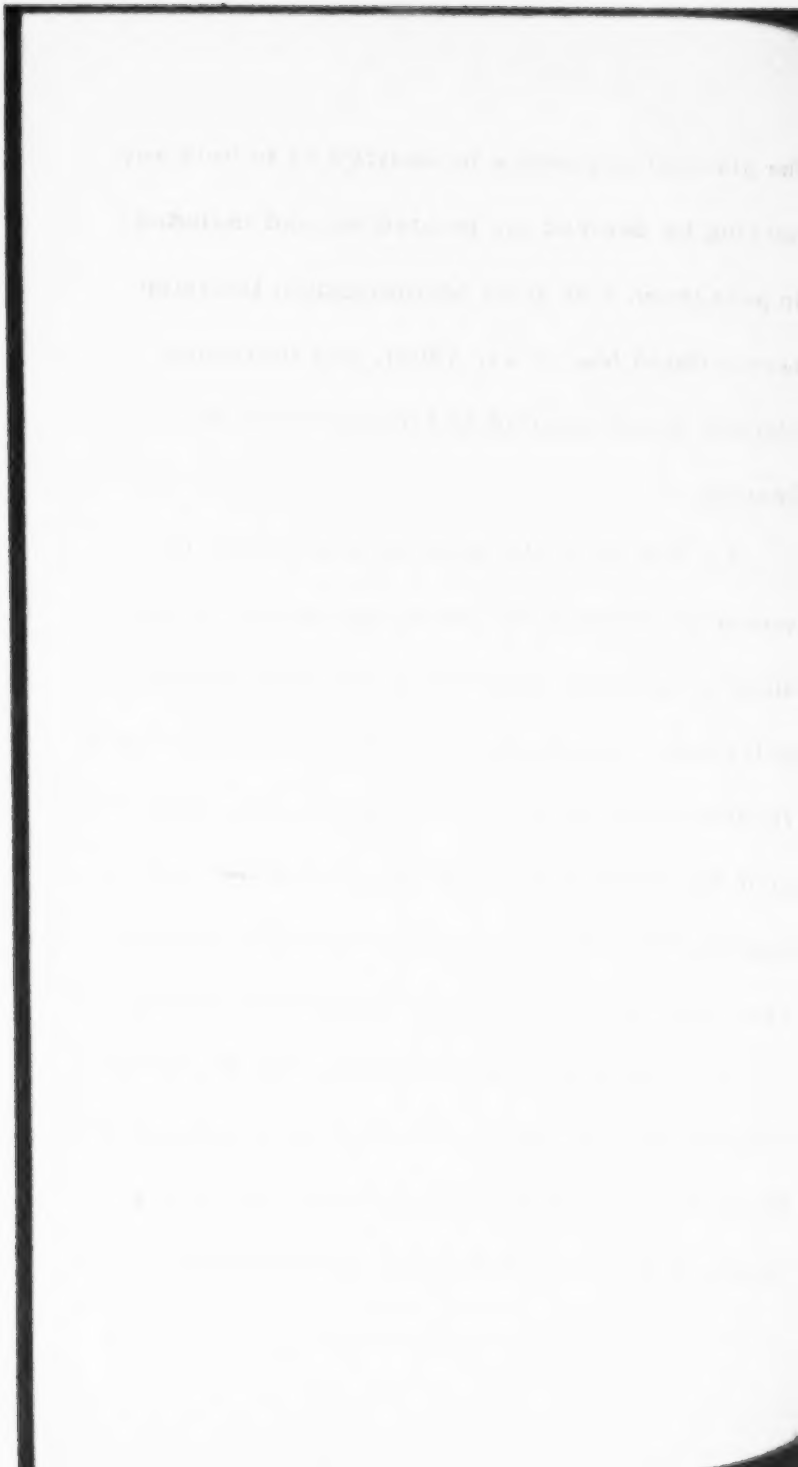
2. The motion to publish depositions was previously granted, but so there will be no misunderstanding about it, such motion is granted again and all depositions taken in this case are ordered published.

3. Counsel for the defendants have eloquently and persuasively argued that extensive correspondence and lengthy meetings were held in connection with the problems encountered by the parties which resulted in the filing of the former suit, Civil No. 5721, and they contend that therefore plaintiff had more than sufficient notice and hearing with regard to the termination of his employment. Counsel for the defendants contend also that Mr. Waddingham advised the plaintiff and his counsel on a number of occasions that the defendants were ready and willing to give

the plaintiff any notice he desired or to hold any hearing he desired (as pointed out and included in paragraph 6 of prior Memorandum Decision herein dated March 14, 1969), and therefore plaintiff is not entitled to further notice or hearing.

4. The difficulty with the arguments advanced as noted in the paragraph above, is that all of such either referred to the prior problem of transfer, insubordination, discharge which was resolved with the conclusion of the prior case--or it has reference to the offers of notice and hearing after the commencement of the present case; and in either event is immaterial herein.

5. The Motion to Reconsider the Memorandum Decision of March 14, 1969 is considered to be not only a motion to reconsider, but to now revoke and set aside the said Memorandum



Decision. There being no proper basis for such action, such motion is denied.

6. The defendant's Motion for Summary Judgment is without basis in law or fact and accordingly is denied.

7. The Findings of Fact, Conclusions of Law and Judgment and Decree heretofore furnished to the Court by plaintiff's counsel, Walter R. Ellett, Esq., are dated, executed and filed with the Clerk of this Court for filing in this case this day.

Dated this 29th day of May 1969.

_____
District Court Judge

Copies:

Walter R. Ellett, Esq., 5085 South State Street, Murray, Utah 84107
Thorpe Waddingham, Esq., Delta, Utah 84624
Richard H. Nebeker, Esq., Kennecott Bldg, Salt Lake City, Utah 84111

IN THE DISTRICT COURT OF THE

FIFTH JUDICIAL DISTRICT

IN AND FOR MILLARD COUNTY

STATE OF UTAH

* * * *

RICHARD M. BROUGH Plaintiff vs. THE BOARD OF EDUCATION OF MILLARD COUNTY SCHOOL DISTRICT; JACK NELSON, DELMA JEAN GALLI, and GERALD B. HUFF, members of the Board; and TALMAGE TAYLOR, Superintendent Defendents	)	Civil No. 5752 FINDINGS OF FACT AND CONCLUSIONS OF LAW

* * * *

BLEED THROUGH, POOR COPY

Plaintiff's motion for summary judgment upon the first cause of action set forth in plaintiff's complaint came on regularly to be heard before the above entitled court. Plaintiff appeared in person and by his attorney, Walter R. Ellett, and the defendants and each of them appeared in person or through their duly elected representative, and by their counsel, Thorpe B. Waddingham. The affidavit of the plaintiff, together with the files and records herein, were presented to the court, together with arguments of counsel. Based thereupon and the court being fully advised in the premises, the court does now make and enter the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. That the plaintiff is a duly qualified secondary teacher and the holder of a current certificate in the area of secondary education,

issued by the Utah State Board of Education, and has been employed by the Board of Education of the Millard County School District for more than seven years consecutively at the Millard High School, Fillmore, Utah.

2. That pursuant to the Millard School District Handbook of Policies, Rules and Regulations, 1966, the plaintiff, under the definition of terms set out therein, is a career teacher in Millard School District.

3. That as a career teacher in the Millard School District, and pursuant to the Handbook of Policies, Rules and Regulations of said District, the plaintiff for the school year 1968-69 had the option of renewing his contract of employment, and could only be terminated for cause in accordance with the conditions of said Handbook of Policies, Rules and Regulations.

4. That on or about the 15th day of February, 1968, the defendant School District, by and through its Superintendent, Talmage Taylor, advised the plaintiff by letter that the Board of Education would not offer him a letter of intent or a contract for the teaching year 1968-69. That the terms and conditions of said letter written on the Millard School District letterhead stationery is as follows:

"Mr. Richard M. Brough
Fillmore, Utah

Dear Mr. Brough:

The Board of Education, at their regular meeting held Thursday, February 15, 1968, took the following action concerning your employment:

Due to difficulties which we have encountered and because of the unrest in the school, you will not be offered a letter of intent or a contract for the coming school year 1968-69.

If you have any questions or would like to meet with the Board of Education concern-

ing this matter, please contact me and I will make arrangements for you to meet with them.

Thank you.

Sincerely,
Talmage Taylor,
Superintendent."

5. That thereafter, the plaintiff, by letter, advised the School Board through the Superintendent of Schools that as a career teacher in the Millard School District he claimed, and thereby exercised, his option to renew his contract of employment for the year 1968-69, referring the said Millard County Board of Education to the Handbook of Policies and Rules and Regulations, Section III C 3.

6. That the Millard County Board of Education took no further action toward employing or continuing in employment the plaintiff. That defendants further took no action toward giving to the plaintiff further or other notice, statement

of problems or charges, statement of status, hearing or notice of hearing, or notice of decision of the Board signed by its President and Clerk, or otherwise.

7. That the defendants thereafter employed other teachers to assume the duties and classes formerly taught by the plaintiff at Millard High School, and that the plaintiff has been and is precluded by the defendants from teaching at the Millard High School; and that plaintiff has presented himself and made his services available for the teaching position claimed by him.

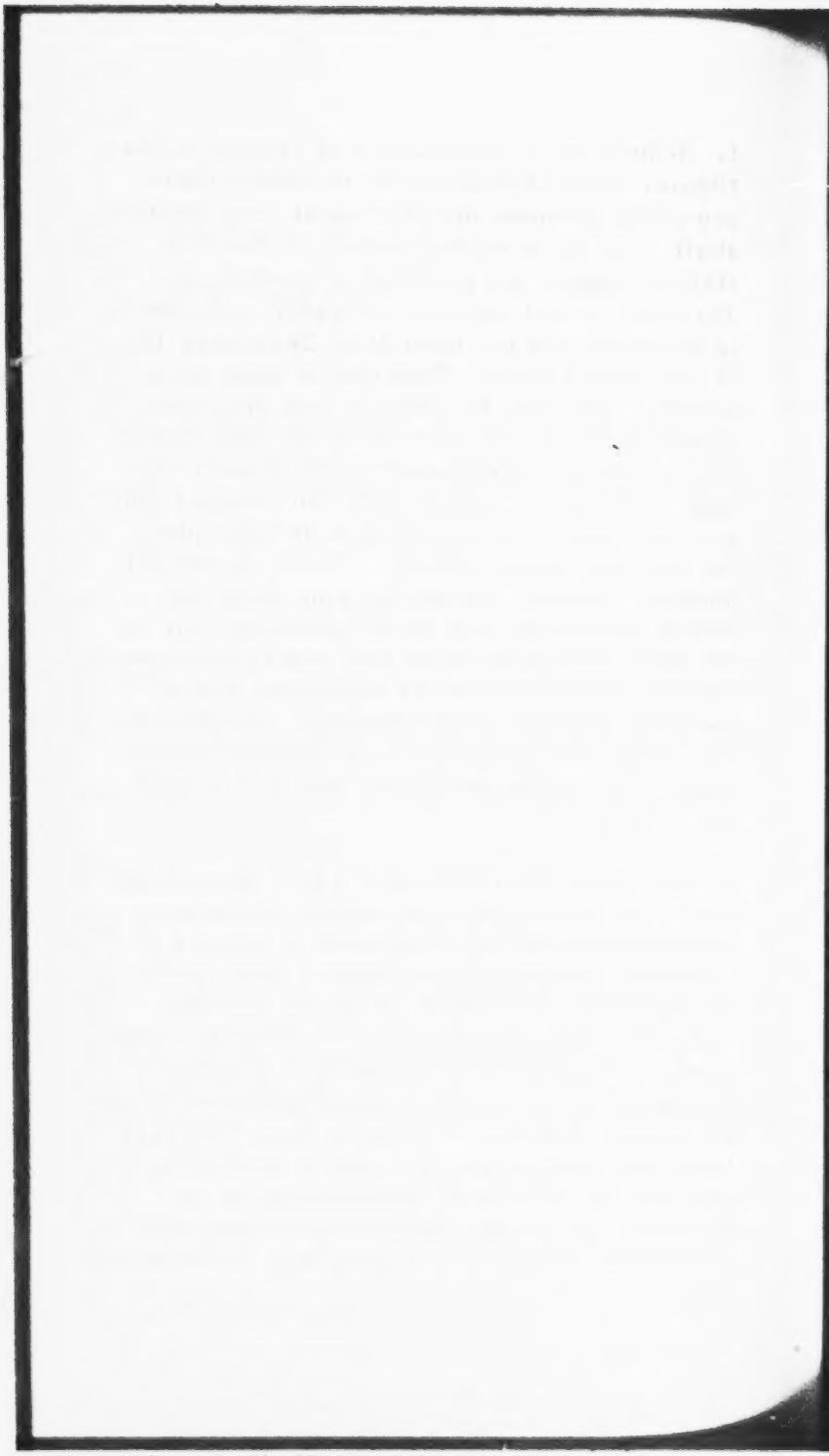
8. That the parties have stipulated that they are bound by the provisions of the "Millard School District Handbook of Policies, Rules and Regulations, 1966". That Section IV B of said handbook provides as follows:

"Section IV B. ORDERLY DISMISSAL.

The contract of a career teacher shall be terminated only in the following manner:

1. Where there is evidence of failure in his regular professional work, or where there are other grounds for dismissal, the teacher shall be given a written notice of the fact, stating clearly his problem or problems. This notice will be given as early as evidence is available but not later than December 1st of the school year. This notice must be in writing, and may be given by the principal, superintendent, or another of the administrative personnel designated by the superintendent. The notice shall state the charges and give assurance of providing a definite plan for teacher improvement. These personnel sources of help, basically, should be the school principal, the superintendent, any or all other administrative and supervisory personnel, and the teachers within the school building wherein he is teaching. As part of the corrective program, the career teacher shall suggest the personnel that are to give assistance.

2. Not later than February 1st of the school year, the career teacher whose success is being questioned shall receive in writing a complete analysis of his work. This shall be signed by the school principal and the superintendent of schools. Therewith, a conference shall be held and additional plans designed for correction and helpfulness to the career teacher. No later than February 15th, the career teacher, the school principal, and an additional administrative or supervisory person shall hold a conference for further analysis of a program for improvement.



3. By March 15th, the career teacher must receive from the superintendent of schools a written statement. This statement shall clearly specify the teacher's status within the school district. If progress has been made, the teacher will be so informed. Therewith, additional plans will be given. If substantial progress has been made, the superintendent of schools shall notify the career teacher that he will be awarded a contract for the following year.

4. In order to terminate the contract of the career teacher, the superintendent shall by March 15th give formal written notice of intent to cancel the contract at the end of the school year. The notice shall review the case and inform the teacher of his rights for a hearing before the Board of Education.

5. Within ten days after receiving the notice, the superintendent shall be informed of the teacher's intent to accept the cancellation of the contract or to request a hearing before the Board of Education. If the teacher elects a hearing, a time and place for the hearing shall be established by the superintendent, and the teacher shall be given notice thereof. The President of the Board shall direct the hearing. The career teacher is entitled to any or all witnesses that he may choose. He may have legal counsel.

6. Within five days after the hearing, the career teacher shall receive the decision of the Board. Such notice shall be in writing and be signed by the President and Clerk of the Board.

7. If the career teacher believes that the decision is a violation of justice or that additional evidence of his success has become available, he may request another hearing before the Board of Education. The second hearing shall proceed in a manner similar to the first.

8. The decision of the Board of Education will be final.

9. That the defendants have failed to comply with the provisions of the Handbook of Policies, Rules and Regulations with regard to the termination of the plaintiff who, under the definitions of the same, is a career teacher.

10. That there is no genuine issue as to any material fact, and that the plaintiff is entitled to judgment as a matter of law for the relief claimed by him in paragraph one of the prayer of his complaint.

From the foregoing Findings of Fact, the court now makes the following Conclusions of Law:

CONCLUSIONS OF LAW

1. That the attempt of the defendants to dismiss the plaintiff was ineffectual and without proper or legal basis and therefore null and void.

2. That the defendants should be ordered to reinstate the plaintiff as a secondary teacher in the Millard High School, Millard School District, Utah, and that his status as a career teacher under the definitions of the Handbook of Policies, Rules and Regulations of said School District be reinstated to him.

3. That the School Board should be ordered to pay to the plaintiff the compensation due to him pursuant to his contract with said School Board for the school year 1968-69.

4. That plaintiff should be awarded judgment for his costs incurred herein.

Dated this 29th day of May, 1969.

BY THE COURT:

_____

JUDGE

IN THE DISTRICT COURT OF THE

FIFTH JUDICIAL DISTRICT

IN AND FOR MILLARD COUNTY

STATE OF UTAH

* * * *

RICHARD M. BROUGH Plaintiff	)	
vs.	)	Civil No. 5752
THE BOARD OF EDUCATION OF MILLARD COUNTY SCHOOL DISTRICT; JACK NELSON, DELMA JEAN GALLI, and GERALD B. HUFF, members of the Board; and TALMAGE TAYLOR, Superintendent Defendants	)	JUDGMENT AND DECREE

* * * *

Plaintiff's motion for summary judgment upon the first cause of action set forth in plaintiff's complaint came on regularly to be heard before the above entitled court. Plaintiff appeared in person and by his attorney, Walter R. Ellett, and the defendants and each of them appeared in person or through their duly elected representative, and by their counsel, Thorpe B. Waddingham. The affidavit of the plaintiff, together with the files and records herein, were presented to the court, together with arguments of counsel. Based thereupon and the court being fully advised in the premises, the court having heretofore made and entered its Findings of Fact and Conclusions of Law, does now make and enter the following Decree:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, as follows:

1. That the attempted dismissal of the plaintiff by the defendants was ineffectual and without

BLEED THROUGH POOR COPY

proper or legal basis, and that the same is thereby declared to be null and void.

2. That the defendants, and each of them, are ordered to reinstate the plaintiff as a secondary teacher in the Millard High School, Millard School District, State of Utah, and it is further ordered that the status of the plaintiff as a career teacher in said school district be, and the same is hereby reinstated to him, together with all rights pertaining thereto, as set forth in the Handbook of Policies, Rules and Regulations of the said District.

3. That the Board of Education of Millard County School District is hereby ordered to pay to the plaintiff that compensation due to him under his contract with the said School Board for the school year 1968-69.

4. That plaintiff is awarded his costs herein.

Dated this 29th day of May, 1969.

BY THE COURT:

_____

JUDGE

In the Supreme Court of the United States

October Term, 1969

No. 1399

Supreme Court, U.S.
FILED
MAY 8 1970
JOHN F. DAVIS, CLERK

RICHARD M. BROUGH,

Petitioner,

vs.

THE BOARD OF EDUCATION OF MILLARD COUNTY SCHOOL DISTRICT, JACK NELSON, DELMA JEAN GALLI and GERALD B. HUFF, Members of the Board, and TALMAGE TAYLOR, Superintendent,

Respondents.

BRIEF IN
OPPOSITION TO PETITION FOR A
WRIT OF CERTIORARI
TO THE
SUPREME COURT OF UTAH

RESPONDENTS' BRIEF

THORPE WADDINGHAM
Delta, Utah
CANNON, GREENE & NEBEKER
400 Kennecott Building
Salt Lake City, Utah 84111
Attorneys for Respondents

I. DANIEL STEWART
WILLIAM J. LOCKHART
Cooperating Attorneys
American Civil Liberties Union
College of Law University of Utah
Salt Lake City, Utah
DANSIE, ELLETT & HAMMIL
Walter R. Ellett
5085 South State Street Murray, Utah 84107
Attorneys for Petitioner

BLEED THROUGH POOR COPY

INDEX

	Page
Jurisdiction and Statute Involved	1
The Question Presented	2
Statement of the Case	3
Conclusion	12

TABLE OF CASES CITED

Anthony vs. Phoenix Union High School Dist., Maricopa County, 55 Ariz. 265, 100 P. 2d 988 11

Baird vs. School District No. 25, Fremont County, 41 Wyo. 451, 287 P. 308 11

Board of Education of City of Los Angeles vs. Swan, 41 Cal. 2d 546, 261 P. 2d 261 ..... 6, 10

Brough vs. Board of Education of Salt Lake City, 23 Utah 2d 174 460 P. 2d 336; 463 P. 2d 567 ..... 6, 8, II

Cardinale vs. Louisiana, 394 U.S. 437 3

Conley vs. Board of Education of City of New Britain, 143 Conn. 488, 123 A. 2d 747 11

Ellis vs. Dixon, 349 U.S. 458 3

Griggs vs. Board of Trustees of Merced Union H.S. Dist., 61 Cal. 2d 93, 389 P. 2d 722 11

Pickering vs. Board of Education, 391 U.S. 563 3

School Dist. No. 1 in Arapahoe County vs. Thompson, 121 Colo. 275, 214 P. 2d 1020 11

State ex rel Early vs. Wunderlich, 144 Minn. 368, 175 N.W. 677 .. 11

Tracy vs. School District No. 22 of Sheridan County, Wyoming, 70 Wyo. 1, 243 P. 2d 932, 70 Wyo. 22, 247 P. 2d 153 11

STATUTES

28 USCA Section 1257 (3) 2

Utah Code Annotated 1953, Section 53-6-20 8

BLEED THROUGH POOR COPY

In the Supreme Court of the United States

October Term, 1969

No. 1399

RICHARD M. BROUGH,

Petitioner,

vs.

THE BOARD OF EDUCATION OF MILLARD COUNTY SCHOOL DISTRICT, JACK NELSON, DELMA JEAN GALLI and GERALD B. HUFF, Members of the Board, and TALMAGE TAYLOR, Superintendent,

Respondents.

BRIEF IN
OPPOSITION TO PETITION FOR A
WRIT OF CERTIORARI
TO THE
SUPREME COURT OF UTAH

RESPONDENTS' BRIEF

JURISDICTION AND STATUTE INVOLVED

The petitioner's claim that his right of free speech was violated by the School Board's action in ordering him to transfer from one school to another, at the same salary, and within the Millard County School District of Utah, was not raised by the pleadings, nor Motion for Summary Judment and was not considered by the courts below.

Petitioner refused to transfer, and after two lengthy Board hearings he was terminated for insubordination in October, 1967. There is no Teacher's Tenure Act in Utah outlining the requirements of procedural due process to conduct a fair hearing on termination. The complaint does not claim that any state statute is unconstitutional, nor does it specially set up any title, right or immunity claimed under the Constitution. 28 USCA Section 1257(3)

The appeal to the Utah Supreme Court was to reverse the Order of Summary Judgment in petitioner's favor. The State appellate decision reversed the trial court and ordered the School Board's Motion for Summary Judgment to be granted. The Board's Motion had been belatedly filed after the trial court had already issued its first Memorandum Decision and Summary Judment granting petitioner an order of reinstatement as a teacher and all lost salary. There has never been a trial, nor Findings of Fact. Respondent emphatically denies that petitioner was ordered to transfer because of a reprimand or sanction for speeches, remarks or newspaper articles made by petitioner.

THE QUESTION PRESENTED

Assuming that a trial had been held and that Findings had been made to support petitioner's statement of the case, the questions presented are: (1) Whether or not the school board was constitutionally barred from ordering the petitioner to transfer from one school to another in view of his expressed opposition to the federal aid to education program, and (2) whether or not the School Board's rules and regulations permitting termination of a tenured teacher for insubordination were unconstitutionally applied.

BLEED THROUGH POOR COPY

Petitioner is contending that his right of free speech immunizes him from accepting a transfer from one school to another as ordered by the Board.

The Writ of Certiorari should be denied for failure to raise, preserve or pass upon the issue in the State courts below. *Cardinale v. Louisiana,* 394 U.S. 437. The question of the constitutionality of the School Board regulations was not raised below and hence is not open here. *Ellis v. Dixon,* 349 U.S. 458. Petitioner's first amendment rights and the application of the *Pickering v. Board of Education,* (391 U.S. 563) decision were raised for the first time by the Petition and Brief of Amicus Curiae, The American Civil Liberties Union, Utah Affiliate, In Support of Petition for Rehearing.

STATEMENT OF THE CASE

Plaintiff was a school teacher for nine years and was employed by the Board of Education of Millard County School District, for the school year 1967-1968. The rules and regulations of the Board gave plaintiff tenure in his employment.

Plaintiff was a representative to the Utah State Legislature and was an ardent and outspoken critic of the Federal Aid to Education Program. In October of 1967, difficulties and dissensions once again arose between plaintiff and his principal, Golden P. Wright, at the Millard High School in Fillmore, Utah, which caused the Superintendent of the School District, Talmage Taylor, to recommend to the Board of Education that plaintiff be transferred from Millard High School in Fillmore to a

COPY BOUND CLOSE IN CENTER

team-teaching position at the same salary at the Delta Junior High School in Delta, Utah. See affidavit of Talmage Taylor, R. 51-58.

Superintendent Taylor wrote to Mr. Brough on October 13, 1967, (R-7) explaining the reasons why Mr. Brough was requested to transfer. The affidavit of Superintendent Taylor (R-53) states that on the evening of the first Board meeting, October 12, 1967, Mr. Brough called the Superintendent at home after the Board meeting and said he had received word of the action of the Board of Education and that he would not teach at Delta Junior High School, but would resign. Due to Mr. Brough's verbal notification to Mr. Taylor that he would not report to teach at Delta (R-53), the Board of Education set a special Board meeting for Tuesday, October 17, 1967, at 10:00 a.m., and Mr. Brough was requested by letter to be at this meeting.

On October 16, 1967, attorney A. Lee Petersen wrote the following letter to Thorpe Waddingham, attorney for the defendant Board:

> Dear Thorpe:
>
> I am writing to you regarding the employment of Mr. Richard M. Brough as teacher at Millard High School. Mr. Brough went to school this morning at his normal time prepared to teach his classes, but was not allowed to do so. He was informed that another teacher was taking his place and to turn in his keys and other items belonging to the school.
>
> Since Mr. Brough is under contract to teach at Millard High School, he regards the above described action as a breach of contract by the Millard County

School District. Of course, Mr. Brough has not officially terminated his employment nor has his employment been terminated by the Millard County Board of Education. Therefore, he must assume that so long as he is ready and willing and able to teach at Millard High School, as agreed in his contract, his pay will continue.

Mr. Brough hereby gives notice to the fact that he is holding himself ready, willing and able to teach at Millard High School in full performance of his obigations under his contract with Millard County School District, and that he expects Millard County School District to likewise fulfill all of the specified obligations under that same contract.

Mr. Brough acknowledges receipt of a letter from Superintendent Talmage Taylor arbitrarily instructing him to appear in Delta, Utah, for a different teaching assignment on October 16, 1967, at 8:30 a.m. *Mr. Brough does not accept such a reassignment and takes the position that the summary manner in which it was issued is a violation of the terms of his employment.*

It is Mr. Brough's position that before any significant change in his teaching assignment is made, he is entitled a fair hearing with reasonable notice and time for preparation and to know in advance the names and addresses of all witnesses who will be called upon to give testimony adverse to him and the substance of any information expected to be taken from such witnesses.

Sincerely,

A. Lee Petersen

Attorney at Law

(emphasis added)

The subject of transfer of teachers is covered in the Board's Rules and Regulations as follows:

Section II-A

> 10. He (the Superintendent) shall assign all teachers to their schools, and make such changes in position as appear to be in the best interest of the schools. As far as possible, grade assignments will be made at the time contracts are issued. *He may change teachers from one school to another or from one grade to another as may seem advisable.*

Section III-D

> 4. *Transfers may be made at the request of the employees or upon the initiative of the Superintendent,* or other administrative officer for reasons which, in the judgment of the Superintendent, shall serve the best interest of the employee and/or the schools. All requests for transfer shall be made in writing.

After citing and relying upon the above provisions of the Rules and Regulations of the Board of Education, the opinion of the Utah Supreme Court states as follows:

> The plaintiff cites other regulations concerning dismissal for incompetency, but we consider them inapplicable to this fact situation.
> It is evident from the foregoing statutory authority and the rules and regulations of the defendant Board, all of which are part of the plaintiff's teaching contract, that he was obliged to accept a transfer when reasonably requested to do so, and that he would be guilty of insubordination upon such refusal. His contract was properly terminated for such refusal.[1]

1. [For an able exposition of the issue here involved, see *Board of Education of City of Los Angeles v. Swan,* 41 Cal. 2d 546, 261 P.2d 261.]

BLEED THROUGH POOR COPY

Petitioner has been represented by four different attorneys throughout these proceedings. His first attorney, Mr. A. Lee Petersen, was County Attorney, and his steadfast position was that the Board could not *transfer* petitioner without a hearing in which petitioner would be entitled to (1) reasonable notice and time for preparation, and (2) to know in advance the names and addresses of all witnesses who will be called upon to give testimony adverse to him, and (3) the substance of any information expected to be taken from such witnesses. See letter of Attorney A. Lee Petersen, October 16, 1967, supra, which is attached to affidavit of Robert L. Steele, Clerk-Treasurer of the Board. In other words, Mr. Petersen was demanding a Bill of Particulars to conform to the practice with which he was familiar under Utah criminal procedure, to apply in a school board administrative matter.

The School Board hearing is governed by administrative procedure and not criminal procedure. These meetings were video-taped and the tapes were incorporated by reference into the Affidavit of Superintendent Taylor. (R-54) Attorney Petersen stated at the Board meetings that the hearing should be before a court reporter authorized to administer oaths and should be held in the evening in Fillmore, Utah (rather than Delta, the location of the School Board offices); that no charges could be presented against the petitioner based on hearsay evidence and that he should be given the opportunity to cross-examine all witnesses (R-55). This meant that the School Board would have been required to put petitioner's students under oath to testify against their teacher if it wished to prove its allegations that Mr. Brough was criticizing the School Board and the principal in his lectures to his class. The record below is

COPY BOUND CLOSE IN CENTER

clear that petitioner and his attorney thwarted the hearing before the Board by insistence on standards devised by County Attorney, A. Lee Petersen.

The opinion of the Utah Supreme Court notes that:

> Regulations concerning teacher tenure and the manner of his discharge are left to the boards of education by virtue of Section 53-6-20 U.C.A. 1953, as amended, which states in part: Every board of education . . . may do all things needful for the maintenance, prosperity and success of the schools, and the promotion of education; and may adopt by-laws and rules for its own procedure, and make and enforce all needful rules and regulations for the control and management of the public schools of the district.

Petitioner's Affidavit in support of his Motion for Summary Judment, made no allegation that the transfer was requested by the School Board as a sanction against his right of free speech. (R-36) The Petition for a Writ of Certiorari extensively argues that the reason for the requested transfer was to punish petitioner for his expression of opposition to Federal Aid Programs, *but this fundamental fact in the petition is not true, is denied by Respondent, and was never presented, pleaded or argued prior to the petition for rehearing filed in the Brief of Amicus Curiae.* Members of the School Board have stated that they thought that petitioner's viewpoint and opposition to Federal Aid Programs could be broadened and enlightened by engaging in a team-teaching method of instruction at Delta Junior High School. There were basic personality conflicts between petitioner and his principal (Golden P. Wright) that called for the transfer of petitioner in order that school

BLEED THROUGH POOR COPY

could be taught without notorious dissension between petitioner and his principal and other school faculty at Millard High School. (R-52)

Petitioner was specifically asked by the president of the School Board at the meeting held October 27 why he was not willing to transfer to the Delta Junior High School and continue his campaign of opposing the School Board's acceptance of Federal Aid to Education. (R-54) Petitioner refused to consider this request, stating that he would not transfer until all reasons for the transfer were proved against him. (R. 55)

The Court will note that none of the newspaper articles or comments expressed by petitioner are contained in the record. We repeat, there was never any trial. When petitioner refused to transfer he was clearly guilty of insubordination, and the only course left open to the Board was to let petitioner teach where he demanded, or to enforce the Board's authority to administer. There was no claim made at the Board meetings or in the court proceedings below that the transfer was a form of punishment or reprisal against Mr. Brough's right of free speech. The petitioner was campaigning for reelection to the Utah Legislature and the Board of Education was not opposed to this, but Superintendent Taylor's Affidavit makes it clear that the dissension at Millard High School commenced in 1966 and continued for at least 18 months. (R-52) In all prior phases of this litigation, petitioner insisted that the Board had to prove: (1) some positive misconduct or dereliction of duty on his part before the Board was lawfully entitled to transfer him; (2) that the dissension at Millard High School was his fault rather than the principal's. Petitioner's Complaint pleads that plaintiff is ready, willing

COPY BOUND CLOSE IN CENTER

and able to continue his duties as a teacher (only) at *Millard High School* and that the plaintiff has for several years been one of the most successful, if not the most successful, teacher in the State of Utah in carrying out a speech and debate program. Petitioner's insistence upon formulating his own ground rules as to what constituted a fair hearing in order for the Board to be authorized to transfer him to Delta Junior High School is what caused the complete breakdown in procedure and evidenced his insubordination. The Utah Supreme Court reviewed all of the affidavits and letters pertaining to the Board meetings and concluded that petitioner had been given a fair hearing. The standards for fair hearing procedures were those set by common law to regulate a school board meeting. Petitioner's position has always remained the same. The Board could not TRANSFER him without a trial and a bill of particulars and sworn testimony from witnesses who could prove that he was the cause of dissension at Millard High School. Petitioner has never cited cases that this is the law. The claim made by petitioner was ridiculous. As an employee he was arguing that his emloyers could not prove that his conduct created friction, unrest and trouble to his employers to cause them to transfer him from one school to another. This was the crux of the case, and the Supreme Court of Utah cited only *Board of Education of City of Los Angeles vs. Swan,* 41 Cal. 2d 546, 261 P. 2d 261 as authority for its decision. This opinion by the Supreme Court of California completely sustains the action taken by respondent, Board of Education, in this case. Respondent also cited the following cases in support of its contention that, where state legislatures do not enact a Teachers' Tenure Act with specific provisions as to discharging a teacher for cause and what type of hearings must be afforded, the school boards, as an administrative elected body, may proceed in

BLEED THROUGH POOR COPY

any reasonable fashion to discharge a teacher as long as a hearing is conducted which is not done in an arbitrary and capricious manner. *Anthony vs. Phoenix Union High School Dist., Maricopa County,* 55 Ariz. 265, 100 P. 2d 988; *Baird vs. School District No. 25, Fremont County,* 41 Wyo. 451, 287 P. 308; *Conley vs. Board of Education of City of New Britain,* 143 Conn. 488, 123 A. 2d 747; *Griggs vs. Board of Trustees of Merced Union H.S. Dist.,* 61 Cal. 2d 93, 389 P. 2d 722; *Kelsey vs. School Dist. No. 25,* 84 Mont. 453, 276 P. 26; *School Dist. No. 1 in Arapahoe County vs. Thompson,* 121 Colo. 275, 214 P. 2d 1020; *State ex rel Early vs. Wunderlich,* 144 Minn. 368, 175 N.W. 677; *Tracy vs. School District No. 22 of Sheridan County, Wyoming,* 70 Wyo. 1, 243 P. 2d 932, 70 Wyo. 22, 247 P. 2d 153.

This case has taken several different courses, and Respondent must emphasize that the facts contained in petitioner's brief are not true. There was never any pleadings, issue or trial that the reason for the transfer was to impose a *sanction* against petitioner's right of free speech. The trial court's Memorandum Decision was based on a finding that the Board of Education failed to follow its Rules and Regulations terminating a teacher for *incompetency.* The Supreme Court of Utah reversed the summary judgment in petitioner's favor, stating:

> The plaintiff cites other regulations concerning dismissal for incompetency, but we consider them inapplicable to this fact situation. (460 P.2d 338)

Petitioner's Brief for a Writ of Certiorari quotes from the Trial Court's Memorandum Decision at page 15, as though this applied to the present posture of the case. At the trial court level, the Motion for Summary Judgment was taken

COPY BOUND CLOSE IN CENTER

under advisement for five months, and then decided on a theory entirely different from the pleadings and affidavit, to wit, that the Board of Education had not followed the procedures that the Rules and Regulations prescribed for firing an incompetent teacher. The issue was whether or not petitioner was guilty of insubordination, not incompetency. The hearing procedures under the Rules were separate and different for these two types of conduct. There is no legal basis for The American Civil Liberties Union to now recite, as facts, what the trial court stated, after the trial court has been reversed; and such theory of termination for incompetency was not presented in the pleadings or in petitioner's Affidavit.

CONCLUSION

The Board Rules and Regulations do not provide for any hearing in order to request a transfer of a teacher from one school to another. Petitioner, a school teacher, and a member of the Utah Legislature demanded a hearing be held in the evening at his home town, with a court reporter and sworn witnesses and a bill of particulars in advance. He would not answer to the Superintendents and Board members' statements and explanation as to why he was requested to transfer, stating, "I have nothing to say until such time as there is a formal hearing wherein I have had the opportunity to present my evidence." (R-54)

If the Supreme Court should grant the writ to review in this case, the opinion could only order the matter tried to a fact finder to determine whether the requested transfer was a form of *punishment* for petitioner's expressed disagreements with federal aid programs. Respondent knows

BLEED THROUGH POOR COPY

that this is not true, and that it could prove that sound reasons existed to request that petitioner be transferred to another school. Contrary to the assertion of petitioner that the order to transfer was a form of punishment, the Board made such transfer in order to eliminate the friction between petitioner and the superintendent and other members of the faculty at Millard High School which had resulted in a deterioration of the educational climate at Millard High School. The American Civil Liberties Union is distorting the record, by claiming that the Board's intent was to *punish* the petitioner. Petitioner thwarted the attempt to hold Board meetings and obtained a summary judgment on a theory of incompetency which was obviously not the pertinent issue. There was no trial or evidence to sustain the position now claimed by the American Civil Liberties Union. The Utah Supreme Court dealt with the case fairly and correctly. The petition for certiorari should be denied.

Respectfully submitted,

Thorpe Waddingham
Cannon Greene and Nebeker
Richard H. Nebeker